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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1929

No. 232

THE HOME INSURANCE COMPANY and FRANKLIN FIRE INSURANCE COMPANY, Petitioners

against

C. J. DICK, TEXAS AND GULF STEAMSHIP COMPANY, and SUDERMAN AND YOUNG, INC.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

DAVID RUMSEY
MARK W. MACLAY
Counsel for Petitioners

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PETITION FOR WRIT OF CERTIORARI

May it please the Court:

The petition of The Home Insurance Company and Franklin Fire Insurance Company respectfully shows to this Honorable Court:

A

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is a petition for a writ of certiorari to the Supreme Court of the State of Texas to review a judgment entered on the 10th day of April, 1929.

On March 18, 1921, in Mexico, C. J. Dick procured a policy of insurance from the Compania General Anglo-Mexicana de Seguros, S. A., hereinafter called the Mexi-

can Insurance Company, insuring the tugboat *R. Waverly* against loss by fire and other casualties in the amount of $35,000. On March 29, 1921, the Mexican Insurance Company entered into reinsurance agreements in Mexico with The Home Insurance Company and Franklin Fire Insurance Company, hereinafter called the American Reinsurance Companies, in the sum of $15,000 respectively.

The policy of insurance contained the following provision:

> "It is understood and agreed that no judicial suit or demand shall be entered before any tribunal for the collection of any claim under this policy, unless such suits or demands are filed within one year counted as from the date on which such damage occurs." Exhibit 2 (R. 101).*

The vessel was alleged to have been destroyed by fire at Tampico, Mexico, on or about July 27, 1921.

On October 27, 1923, more than two years after the alleged fire, the insured, C. J. Dick, filed suit in the District Court of Galveston County, Texas, against the Mexican Insurance Company to recover a total loss under the Mexican policy. (R. 5-7)

The Mexican Insurance Company was a corporation incorporated under the laws of Mexico, had no agent in Texas, and was served by publication. The plaintiff, Dick, sued out ancillary writs of garnishment against the American Reinsurance Companies, each of which was a corporation organized and existing under the laws of the State of New York. The affidavit for garnishment was in the Texas statutory form. Texas & Gulf Steamship Company and Suderman & Young, Inc., were allowed to intervene.

The American Reinsurance Companies, as garnishees, answered, denying any indebtedness to the Mexican Insur-

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* All references to the record are to the pages of the certified unprinted record prepared by the Clerk of the Supreme Court of the State of Texas and on file with the Clerk of this Court. The record has not yet been printed.

ance Company. The plaintiff, Dick, filed controverting affidavits alleging that each of the American Reinsurance Companies was indebted to the Mexican Insurance Company in the sum of $15,000 on the ground that shortly after the issuance of the policy by the Mexican Insurance Company it had reinsured its obligation assumed thereby with each of the American Reinsurance Companies to the extent of $15,000, and that hence each of the American Reinsurance Companies was indebted to the Mexican Insurance Company in that amount.

The American Reinsurance Companies in their answers to the garnishment proceeding denied that they were indebted to the Mexican Insurance Company, and pleaded in bar of plaintiff's suit that it was not brought within one year from the date of damage, in accordance with the terms of the policy.

The American Reinsurance Companies, as garnishees, further alleged that the said insurance policy was executed in Mexico, was intended to be performed in Mexico, and was valid under certain provisions of the Commercial Code of the Republic of Mexico; that the clause above quoted was a valid defense to any suit brought to recover on said policy after the expiration of one year from the date on which the alleged damage occurred; and that this suit was not filed within one year. (R. 45-48)

To these answers of the garnishees, the plaintiff filed a general demurrer on the ground, among others, that Article 5545 of the Revised Civil Statutes of Texas of 1925 was a valid statute of the State of Texas which prohibited entering into a contract containing a limitation of less than two years of the time within which suit might be brought. The text of the statute referred to in this demurrer is as follows:

> "Art. 5545. No person, firm, corporation, association or combination of whatsoever kind shall enter into any stipulation, contract, or agreement, by reason whereof the time in which to sue thereon is

limited to a shorter period than two years. And no stipulation, contract, or agreement for any such shorter limitation in which to sue shall ever be valid in this State."

The District Court of Galveston County sustained the demurrer upon the ground that Article 5545 of the Revised Civil Statutes of Texas of 1925 was a valid statute, not in conflict with either Section 10 of Article I of the Constitution of the United States, or Article XIV of the Amendments of the Constitution of the United States. Judgment was accordingly rendered by the said District Court of Galveston County in favor of the plaintiff for $17,587.50 and in favor of the intervenors for $19,087.50 against the Mexican Insurance Company; and in the garnishment proceeding, the main cause and the said garnishment proceeding having been tried together as one case, judgment was rendered in favor of the plaintiff and the intervenors against The Home Insurance Company for $18,337.50 and against Franklin Fire Insurance Company for the same amount. (R. 49-51)

The American Reinsurance Companies duly appealed from these judgments to the Court of Civil Appeals of Texas for the First Supreme Judicial District of Galveston. That court affirmed the judgments of the court below. (R. 178-193) The American Reinsurance Companies then duly appealed to the Supreme Court of Texas. That court affirmed the judgments of the District Court of Galveston County and of the Court of Civil Appeals, above referred to. (R. 226-233)

The American Reinsurance Companies' motion for rehearing in the Supreme Court of Texas was denied. (R. 238)

The American Reinsurance Companies' application for an appeal to this court was allowed by the Chief Justice of the Supreme Court of Texas on June 14, 1929. (R. 247) The case was docketed in this court on July 11, 1929, and a statement of jurisdiction on appeal was filed herein on August 10, 1929.

B

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

(1) By the decision below a Texas statute prohibiting the entering into, and rendering invalid, any stipulation, contract or agreement limiting the time to sue thereon to a shorter period than two years was held to control a contract of insurance, entered into in a foreign country to be performed in a foreign country and between non-residents of Texas. This contract between the insured and the Mexican Insurance Company contained a clause by which the parties thereto mutually agreed to limit the time to bring suit to one year. Such a provision was a valid one under the laws of Mexico, where the contract was entered into.

The Texas court, by erroneously applying the local statute, violated Paragraph 1 of Section 10 of Article I of the Constitution of the United States by impairing the obligation of the contract herein, and also took from the petitioners their property without that due process of law guaranteed by Section 1 of Article XIV of the Amendments of the Constitution of the United States.

The question whether a local statute of limitations can be applied to a foreign contract specifically providing the time within which suit may be brought is a federal question of substance that has not heretofore been determined by this court. Moreover, an examination of the decisions of this court in analogous situations shows the decision of the Texas court to be in conflict with the principles set forth in such decisions. *Aetna Life Insurance Co.* v. *Dunken*, 1924, 266 U. S. 389; *New York Life Insurance Co.* v. *Dodge*, 1917, 246 U. S. 357.

(2) In the decision below the Texas court erroneously held that by garnishee process it could obtain jurisdiction of the petitioners herein, The Home Insurance Company and Franklin Fire Insurance Company. The court in its

opinion stated that the test of jurisdiction is whether or not the debtor (garnishee) is subject to suit at the hands of the creditors in the jurisdiction in which the garnishment is sought. It held as well settled that foreign insurance companies doing business by agents within a state are treated as residents and debts due from them to non-residents are garnishable in the state where they are doing business.

Irrespective of the correctness of such a test, the decision was erroneous in holding the test satisfied by the state of facts before it. The whole theory of the test is dependent upon there being an existing debt due which the creditor could pursue against the debtor (garnishee). In the instant case there could exist no such debt for as a condition precedent thereto there must have been a debt due from the Mexican Company, to C. J. Dick, the insured. The Texas court in holding such a debt existed relied on the decision of this court in *Allemannia Fire Insurance Co.* v. *Firemen's Insurance Co.*, 1907, 209 U. S. 326.

That decision is not controlling in the instant case. It holds that in the usual relationship of an insurer and reinsurer the debt arises upon the happening of the loss. That decision cannot apply where as an incident of the contract between the insurer and the insured, it is a part of such contract that no liability shall exist unless suit be commenced within one year from the date of loss, which was not done in this case. This clause of the contract, mutually agreed to by the parties, was a limit to the undertaking of the primary insurer and a condition precedent to the existence of any debt. By its erroneous decision in applying a non-applicable decision of this court, the petitioners herein were deprived of property without due process of law, in violation of the rights to them reserved by Section 1 of Article XIV of the Amendments of the Constitution of the United States.

(3) The result of the decision of the Texas court in granting the plaintiff below relief against the garnisheed

reinsurers, is to allow the insured relief directly against the reinsurance companies. Such a result has never been within the contemplation of the parties to reinsurance contracts and could only result from a privity of contract between the insured and the reinsurer which relationship this court has specifically held does not exist. *Morris & Co. v. Skandinavia Ins. Co.*, 1929, 279 U. S. 405 (Preliminary Print).

By thus allowing the plaintiff below a direct recovery against the petitioners herein, there existing no privity of contract between the parties, the petitioners were deprived of property without due process in violation of Section 1, Article XIV of the Amendments of the Constitution.

(4) The petitioners herein have qualified to transact business in every state in the United States and the same is true of the majority of other insurance companies who participate in the reinsurance business. The result of this decision is in effect to hold the reinsurance companies under a liability to the insured similar to that of a direct writing company at the whim of the insured in any state in which the reinsurance company has qualified to do business. The insured by this decision is permitted to recover against the reinsurer by suit in a state in which the direct writing company has not qualified to do business and has no assets beyond the contract of reinsurance, thus allowing the insured to obtain recovery that he could not have had but for the contract of reinsurance to which he was not a party. This is directly contrary to the contractual relations entered into in the contracts of reinsurance.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Texas, commanding that court to certify and to send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 1235-5265, en-

titled *The Home Insurance Company (Compania General Anglo-Mexicana de Seguros S. A.), Plaintiff in Error,* v. *C. J. Dick et al., Defendants in Error,* and that the said judgment of the Supreme Court of the State of Texas may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

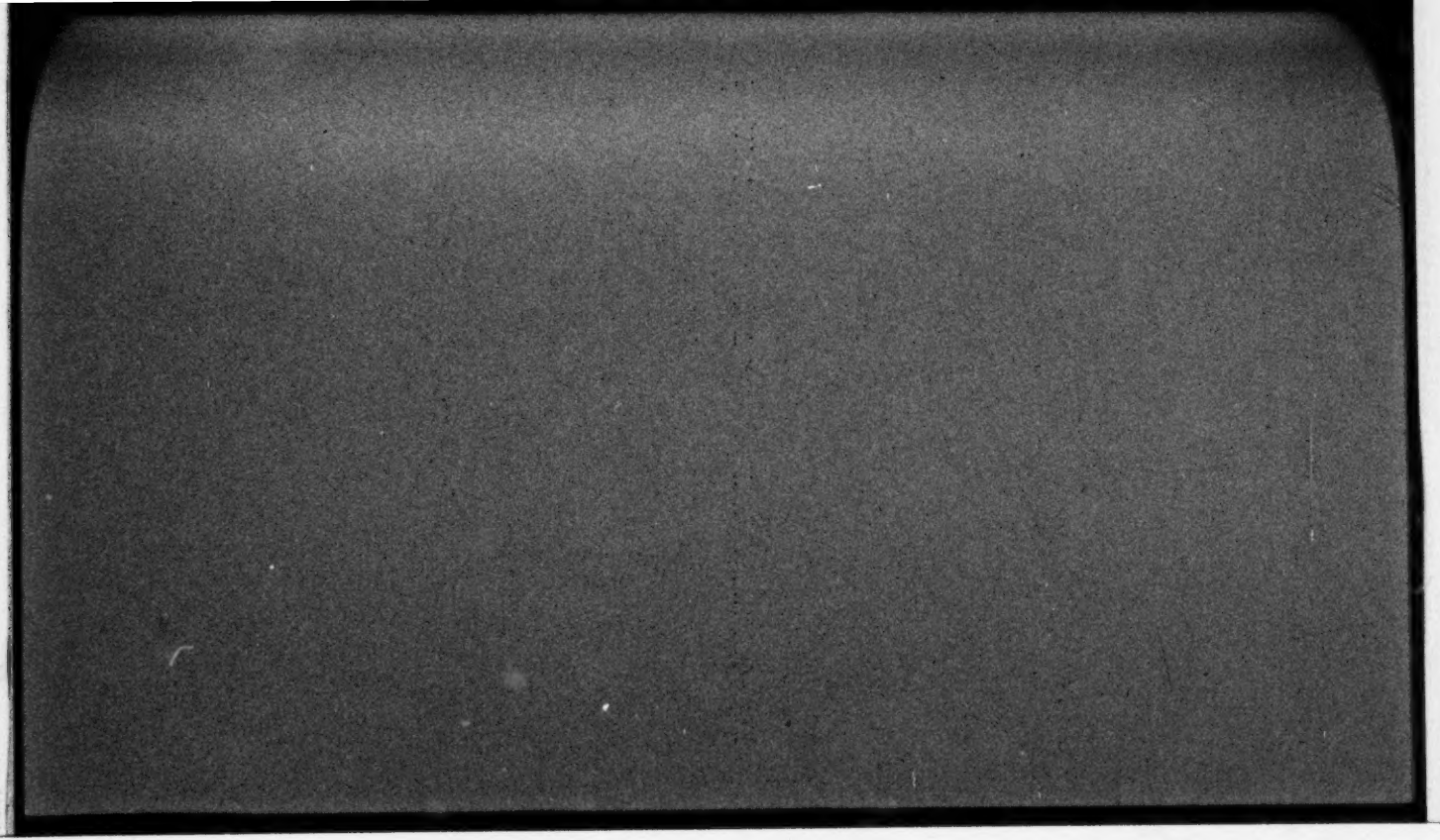
THE HOME INSURANCE COMPANY

and

FRANKLIN FIRE INSURANCE COMPANY

By DAVID RUMSEY
MARK W. MACLAY
Counsel for Petitioners

BRIEF IN SUPPORT OF WRIT FOR CERTIORARI



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 232

THE HOME INSURANCE COMPANY and FRANKLIN FIRE INSURANCE COMPANY, Petitioners,

against

C. J. DICK, TEXAS AND GULF STEAMSHIP COMPANY, and SUDERMAN AND YOUNG, INC.

BRIEF IN SUPPORT OF WRIT FOR CERTIORARI

I

THE OPINIONS OF THE COURT BELOW.

The opinion in the Supreme Court of the State of Texas is not officially reported but may be found in 15 S. W. (2nd) 1028. (R. 226-233)

The opinion in the Court of Civil Appeals of Texas is not officially reported but may be found in 8 S. W. (2nd) 354. (R. 178-193)

II

JURISDICTION.

1. The statutory provision believed to sustain the jurisdiction of this court is Judicial Code, §237 (b), as amended by the Act of February 13, 1925, Chapter 229, §1, 43 Stat. 937 (United States Code, Title 28, §344).

2. The date of the judgment to be reviewed is April 10, 1929. (R. 225)

A motion for rehearing was filed in the Supreme Court of the State of Texas on the 24th day of April, 1929. (R. 234-237) An order of that court denying the motion for rehearing was entered on the 12th day of June, 1929. (R. 238)

3. A full statement of the nature of the case and of the rulings below has been given under heading "A" in the petition.

The Supreme Court of Texas is the highest court of the State of Texas in which a decision in this suit can be had; and therein and in the Court of Civil Appeals and in the District Court these petitioners drew in question the validity of the statute of the State of Texas, to wit: Article 5545 of the Revised Civil Statutes of Texas of 1925, on the ground of its being repugnant to the Constitution of the United States.

III

Statement of the case.

A full statement of the case has been given under heading "A" in the petition and in the interest of brevity the statement is not repeated at this point.

IV

Specification of errors.

1. The Supreme Court of the State of Texas erred in finding and holding that Article 5545 of the Revised Civil Statutes of Texas of 1925 was applicable to the policy of insurance entered into in Mexico by the Mexican Insurance Company with the insured, C. J. Dick.

2. The Supreme Court of the State of Texas erred in finding and holding that the provision of the policy of

insurance limiting suit to a period of one year was not a substantial part of the contract of insurance but was a matter of remedy, in which the parties had no constitutional rights and governed by the *lex fori*.

3. The Supreme Court of the State of Texas erred in finding and holding that the garnishments which impounded funds of the American Reinsurance Companies were valid.

4. The Supreme Court of the State of Texas erred in finding and holding that there was a debt due from the American Reinsurance Companies to the Mexican Company.

5. The Supreme Court of the State of Texas erred in permitting the insured to recover judgment against the petitioners, the American Reinsurance Companies, although there was no privity of contract between the said insured and the Reinsurance Companies.

V

Argument.

Summary of Argument:

A. The decision of the Supreme Court of Texas in holding Article 5545 of the Revised Civil Statutes of Texas of 1925 applicable to the policy of insurance herein was repugnant to the Constitution of the United States.

B. The decision below is contrary to and in conflict with prior decisions of this court that the validity of a contract is determined by the law of the place where the contract is made and to be performed.

C. The decision of the State Court of Texas was contrary to and in conflict with a prior decision of this court holding that no privity exists between the insured and the reinsurer.

POINT A

THE DECISION OF THE SUPREME COURT OF TEXAS IN HOLDING ARTICLE 5545 OF THE REVISED CIVIL STATUTES OF TEXAS OF 1925 APPLICABLE TO THE POLICY OF INSURANCE HEREIN WAS REPUGNANT TO THE CONSTITUTION OF THE UNITED STATES.

The rights of C. J. Dick, the insured, are contained in and are limited by the terms of the policy of insurance issued to him by the Mexican Insurance Company. It is uncontroverted that this policy of insurance contained a clause providing that no suit or demand should be entered for the collection of any claim under the policy unless such suit or demand were filed within one year of the date of the damage. It is also admitted by all parties that suit was not instituted until more than two years after the fire by which the alleged loss was incurred.

The provision in the policy thus limiting the time within which suit might be brought was valid under the law of Mexico, the place where the insurance contract was entered into, where the insured property was located and under which laws the rights and liabilities of the contracting parties were fixed.

The insured's rights, arising from the contract, their only source, to recovery for damage caused to him by reason of the risk insured, were expressly made subject to the valid condition that suit to recover such damages must be instituted within one year from the date of the loss. If such condition precedent were not complied with, the parties by their express language agreed that the insurer's liability should cease and the insured's right be lost.

The insured has not complied with the condition precedent to his rights that was validly imposed at their inception, but now, having lost such rights, seeks to have them revived and the scope of the insurer's liability extended beyond the bounds set forth in the instrument defining such liabilities by bringing suit in the Texas courts and invoking the protection of that state's local statute.

The court, in sustaining the insurer's contention and applying the statute to this policy, has impaired the obligation of the contract thereunder in violation of the Constitution and has further, by thus increasing the scope of the insurer's liability, deprived it, and in turn your petitioners, of property without due process of law, in violation of the Fourteenth Amendment to the Constitution.

This court decided as early as *Riddlesbarger* v. *Hartford Insurance Co.*, 1868, 7 Wall. 386, that the scope of liability of an insurer limited by an express stipulation as to the time of bringing suit, valid when and where made, could not be enlarged by a statutory provision lengthening the time to bring suit.

In that case a statute of Missouri allowed a party who suffered a non-suit to bring an action for the same cause within one year after the entry of such non-suit. The insured brought an action on a policy within one year after the loss, the period set forth in the policy; suffered a non-suit; and again sued after the lapse of the one year provided for by the policy but within a year of the non-suit. The plaintiff pleaded the Missouri statute. The defendant's demurrer to the complaint was sustained by the Circuit Court, and this court affirmed the judgment.

In its opinion, after holding the contractual limitation to be valid, the court, by Mr. Justice Field, said:

> "* * * the rights of the parties flow from the contract. That relieves them from the general limitations of the statute, and, as a consequence, from its exceptions also." P. 391
>
> * * * * * * *
>
> "We have no doubt of its validity. The commencement, therefore, of the present action within the period designated was a condition essential to the plaintiff's recovery and this condition was not affected by the fact that the action, which was dismissed, had been commenced within that period." P. 392

The Supreme Court of Texas by applying the Texas limitation statute to this contract deprived the petitioners of their property by excising from the contract one of its valid and, as said in the *Riddlesbarger* case (*supra*), "essential" conditions.

POINT B

THE DECISION BELOW IS CONTRARY TO AND IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT THAT THE VALIDITY OF A CONTRACT IS DETERMINED BY THE LAW OF THE PLACE WHERE THE CONTRACT IS MADE AND TO BE PERFORMED.

It has long been settled by repeated decisions of this court that matters concerning the validity of the terms of a contract are determined by the law of the place where the contract is entered into and is to be performed. *Scudder* v. *Union National Bank*, 1875, 91 U. S. 406, 412; *New York Life Insurance Co.* v. *Head*, 1913, 234 U. S. 149, 161. The contract of insurance on which the plaintiff Dick sued was entered into and was to be performed in the Republic of Mexico. The question of the validity of the limitation in the contract of the time within which suit must be brought should, therefore, be determined by the law of Mexico under which it was undoubtedly valid, entirely irrespective of the jurisdiction in which the plaintiff happened to sue. The Supreme Court of the State of Texas, however, entirely disregarded this fundamental principle and, in holding that the validity of this provision was to be determined by the laws of the forum instead of by the law of the place where the contract was entered into and was to be performed, decided this case in a way not in accord with applicable decisions of this court.

The decision of the Supreme Court of the State of Texas seems doubly erroneous when it is considered that in addition to holding the Mexican Company liable on the policy of insurance, it went further and held these petitioners, the Mexican Company's reinsurers, directly liable on this

reinsurance contract which was not entered into and was not to be performed in the State of Texas and did not contemplate any activity by either party to it in the State of Texas.

When it is considered that most of the important reinsurance companies do business in practically every state of the Union, the effect of the decision below concerns a large number of important interests beside the parties to this suit and the question here presented is believed to be one which warrants the consideration of this court.

The decision sought to be reviewed relied on the change of residence of the assured as the basis of application of the Texas statute. In a case precisely similar to the case at bar, *Union Central Life Insurance Co.* v. *Barnes,* 1917, 175 Ky. 364, the policy of insurance contained a stipulation that suit must be brought within one year. There, as here, the contract was valid where made. The insured moved to another jurisdiction and in reliance upon a statute in which the period of limitation was greater than one year, entered suit after the lapse of the limitation period set forth in the contract. The court held that the contractual limitation in a policy, valid where made, would be enforced by the courts of Kentucky although contrary to the limitation statute of that state; and said:

> "This Court was constrained to abide by the rules of comity, always recognized and enforced here, as elsewhere, rather than to impress its peculiar view upon a foreign contract subjected to litigation here * * *. The public policy of the State is not affected or infringed by the making of such a contract elsewhere, and under the rules of comity, we are bound to enforce a contract valid where made. Any other position would be at variance with all authority and entirely indefensible. *Under this view it is immaterial that appellee, when the cause of action accrued, and when the suit was filed, was a resident of this State.*" (Italics ours.)
>
> * * * * * * *
>
> "It is also argued for appellee, that the question of limitation is one of remedy, governed by the lex

fori rather than the lex loci contractus, and this would be true, if the question were one as to which statute of limitation should apply, whether of the state where the contract was made or the state where the remedy is sought to be enforced; but such is not the case here, since the statutes of limitations of the respective states are not involved, but only the validity of the contract itself." P. 367

Decisions to the same effect on this precise question have been made by the highest courts of Missouri and North Dakota. *Donlan* v. *Royal Neighbors of America*, 1906, 123 Mo. App. 147; *Travelers Ins. Co.* v. *California Ins. Co.*, 1890, 1 N. D. 151.

In the Missouri case, the court held that such a limitation of time within which suit might be brought is a qualification of the rights created under the contract and as such does not pertain to the remedy and if valid in Illinois where made is valid in Missouri where suit was instituted. In that case the court said:

"It is determined to be a provision which * * * imposes a restriction or qualification upon the rights vouchsafed in the contract entirely independent of the limitation statute * * * it operates in the nature of a condition precedent to forfeit the liability where suit is not instituted within the stipulated time." P. 156

In the North Dakota opinion, the following is the treatment by the court of this question:

"No question is made of the validity of the limitation clause in the policy. Such provisions are valid in the absence of a statute. This is settled law. Our statute relates to such provision (Sec. 3582) but it is conceded that the statute has no application to the facts of this case because the contract was a Minnesota contract insuring property there, made there, and to be performed there. The limitation was valid in that state and it in terms extinguished the right and did not merely bar the remedy * * *." P. 158

The precise point here involved has not been passed upon by this court. But in *Aetna Insurance Co.* v. *Dunken*, 1924, 266 U. S. 389, and *New York Life Insurance Co.* v. *Dodge*, 1917, 246 U. S. 357, this court has considered questions analogous to the case at bar. In both of these cases the validity of a statute of the state wherein suit was brought as applied to a contract of insurance entered into in another state was in question.

In the *Dunken* case (*supra*), this court refused to uphold such application of a Texas statute imposing a penalty for non-payment by the company within thirty days after demand to a contract entered into in Tennessee.

This court reversed the decision of the Missouri court in the *Dodge* case (*supra*) where that court had applied a statute of Missouri prohibiting forfeiture for non-payment of premium where a loan agreement, valid in New York where the contract was made, specifically provided for application of the total fund to the satisfaction of the loan agreement upon the failure of insured to meet the premiums.

The general rule in cases similar to the case at bar, where the validity of a stipulation limiting time within which suit may be brought upon a policy, when such policy is the subject of a suit in a jurisdiction other than that in which it was entered into, is stated in an authoritative treatise on insurance as follows:

> "It would seem to be the general rule that the validity of a stipulation as to the time of bringing suit is governed by the law of the place where the contract was made."
>
> 7 *Cooley's Briefs on Insurance*, 2nd Ed., 6808.

The question is discussed in 2 *May on Insurance*, 4th Ed., 1139, Sec. 478, where the following is found:

> "A condition in a policy of fire insurance that no action against the insurers for the recovery of any claim upon the policy shall be sustained, unless commenced within a certain period after the loss

shall have occurred, and that the lapse of this period shall be conclusive evidence against the validity of any claim asserted, if an action for its enforcement shall be subsequently commenced, is valid, and is generally held not to be in contravention of the policy of statutes of limitation. It stands upon the same grounds as other conditions precedent."

POINT C

THE DECISION OF THE SUPREME COURT OF TEXAS WAS CONTRARY TO AND IN CONFLICT WITH A PRIOR DECISION OF THIS COURT HOLDING THAT NO PRIVITY EXISTS BETWEEN THE INSURED AND THE REINSURER.

The Texas court obtained jurisdiction over the Mexican Insurance Company by publication and by writ of garnishment in the Texas statutory form. The Mexican company was not qualified . . do business in, and had no agent in Texas. Being a foreign corporation not doing business within the state, the jurisdiction depended upon the attaching of some of its assets within the state. The asset which the insurer garnisheed as the basis of his suit was the reinsurance obligation alleged to be due to the Mexican company by the American reinsurers in respect to this very loss. The existence of such a debt was dependent upon a loss suffered by the insured recoverable against the Mexican Insurance Company. The loss was one that was not recoverable against the Mexican Insurance Company in Mexico which was the place where it was doing business and had assets since the defense of the time limit in the policy was open to it. The Supreme Court of Texas nevertheless held that by reason of the contract of reinsurance, to which the insured was not a party, suit could be maintained in Texas where the Mexican company was not present and had no assets except the alleged debt arising out of such contract.

The result of such decision in allowing the insured thus to benefit by the contract of reinsurance between the

Mexican Insurance Company and the American Reinsurance Companies to which he was a stranger in effect gave a direct right to the insured and held him privy to such contract which is in direct conflict with the decision of this court in *Morris* v. *Skandinavia Ins. Co.*, 1929, 279 U. S. 405 (Preliminary Print).

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its discretionary powers to the end that a writ of certiorari should be granted and this Court should review the decision of the Supreme Court of the State of Texas and finally reverse it.

New York, September 9, 1929.

Respectfully submitted,

DAVID RUMSEY,
MARK W. MACLAY,
Counsel for Petitioners.

APPELLANTS' BRIEF

FILE COPY

FILED
JAN 9 1930
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1929

No. 232

THE HOME INSURANCE COMPANY and FRANKLIN FIRE INSURANCE COMPANY,

Appellants

vs.

C. J. DICK, TEXAS & GULF STEAMSHIP COMPANY, and SUDERMAN & YOUNG, INC.

BRIEF FOR APPELLANTS

DAVID RUMSEY
MARK W. MACLAY
Counsel for Appellants

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SUPREME COURT OF THE UNITED STATES

THE HOME INSURANCE COMPANY and FRANKLIN FIRE INSURANCE COMPANY,

Appellants

against

C. J. DICK, TEXAS & GULF STEAMSHIP COMPANY, and SUDERMAN & YOUNG, INC.

October Term 1929
No. 232

BRIEF FOR APPELLANTS

I. PRELIMINARY STATEMENT

This is an appeal from a final judgment of the Supreme Court of the State of Texas entered on April 10, 1929 (R. 76).

The opinion in the Supreme Court of the State of Texas (R. 77-83) is not officially reported but may be found in 15 S. W. (2d) 1028. The opinion in the Court of Civil Appeals of Texas (R. 43-56) is not officially reported but may be found in 8 S. W. (2d) 354.

A motion for rehearing was denied by the Supre Court of Texas by order entered June 12, 1929 (R. 83

The petition for appeal (R. 84-90) was present to the Chief Justice of the Supreme Court of the Sta of Texas and allowed on June 14, 1929 (R. 90).

The case was docketed in this court on July 11, 19 (R. 99); and a statement as to jurisdiction on appe pursuant to the first paragraph of Rule 12, was filed August 9, 1929.

By this appeal the appellants seek to review the fi judgment herein of the Supreme Court of the State Texas, the highest court of the state in which a de sion in this suit could be had, where was drawn question the validity of Article 5545 of the Revi Civil Statutes of Texas, 1925, on the ground of being repugnant to the Constitution of the Uni States, and where the decision was in favor of validity of this statute, the text of which follows:

> "No person, firm, corporation, association combination of whatsoever kind shall enter i any stipulation, contract, or agreement, by son whereof the time in which to sue ther is limited to a shorter period than two ye And no stipulation, contract, or agreement any such shorter limitation in which to sue s ever be valid in this State."

The appellees filed an answer to the appellants' st ment as to jurisdiction and moved to dismiss this peal. On September 12, 1929, the appellants file

a motion in this case, a petition for a writ of certiorari and brief in support thereof.

On October 28, 1929, this court ordered that further consideration of the petition for a writ of certiorari herein and further consideration of the jurisdiction of this court be postponed to the hearing of the case on its merits.

II. STATEMENT OF THE CASE

A. Facts

On March 18, 1921, in Mexico, C. J. Dick procured a policy of insurance from the Compania General Anglo-Mexicana de Seguros, S. A., hereinafter called the Mexican Insurance Company, insuring the tugboat *R. Waverly* for one year against loss by fire and other casualties in the amount of $35,000 (R. 32-39).

On March 29, 1921, the Mexican Insurance Company entered into reinsurance agreements with the appellants, The Home Insurance Company and Franklin Fire Insurance Company, hereinafter called the American Reinsurance Companies. The position of the two reinsurance companies is substantially identical and each presumably accepted reinsurance of $15,000 upon receipt in New York of the declarations sent from Mexico on March 29, 1921. *Exhibits 3 and 4* (R. 9, 40).

The policy of insurance was limited to certain specified Mexican coastal waters and contained most of the clauses familiar in marine policies. The following

clauses of the policy are quoted in full because they play an important part in the decisions below and in the questions presented on this appeal:

> "It is understood and agreed that no judicial suit or demand shall be entered before any tribunal for the collection of any claim under this policy, unless such suits or demands are filed within one year, counted as from the date on which such damage occurs.
>
> * * * * * *
>
> "The present policy is subjected to the dispositions of the Commercial Code, in that it does not alter or modify the stipulations which that same contains" (R. 38).

The "dispositions of the Commercial Code" of the Republic of Mexico thus incorporated by reference were alleged (R. 5, 21) and admitted (R. 6, 23) to be as follows:

> "ARTICLE 1038. 'The rights of action derived from commercial acts shall be subject to prescription in accordance with the provisions of this Code.'
>
> "ARTICLE 1039. 'The periods fixed for the enforcement of rights of action arising out of commercial acts shall be fatal except restitution against same is given.'
>
> "ARTICLE 1043. 'One year shall prescribe actions derived from contracts of life insurance, sea and land.'"

There were various endorsements, the last one of which, dated Mexico, July 18, 1921, agrees:

> "that as from July 12th, 1921, all the interests, rights and obligations of the above mentioned Policy, are transferred to and solely vested in Mr. C. J. Dick as Lessee of the Insured Craft" (R. 39).

The vessel was alleged to have been destroyed by fire at Tampico, Mexico, on or about July 27, 1921 (R. 2, 9).

B. Proceedings Below

On October 27, 1923, more than two years after the alleged fire, the appellee C. J. Dick filed suit in the District Court of Galveston County, Texas, against the Mexican Insurance Company to recover a total loss under the Mexican policy, by petition alleging the making and transfer of the policy and the total loss of the vessel, and praying for citation by publication because the Mexican Insurance Company was a non-resident of Texas (R. 1-2).

The Mexican Insurance Company, being incorporated under the laws of Mexico and having no agent in Texas, was accordingly cited by publication and an answer on its behalf filed by attorneys appointed by the court (R. 3).

This answer filed January 14, 1927, without waiving any defects in service and without any appearance except by attorneys appointed by the court, demurred to

the petition (R. 3), denied all its allegations (R. 4), and pleaded specially the following defenses:

1. The suit was not filed within one year from the date of the damage, which is a complete defense to any suit brought on the policy because of the agreement in the policy that no suit should be begun unless filed within that time, which provision was valid under the laws of the Republic of Mexico, where the contract was made and was performable and was intended to be performed (R. 4).

2. The suit was not instituted within the period provided by certain provisions of the Commercial Code of the Republic of Mexico (which were incorporated by reference in the policy [R. 38]), which provisions barred completely the right of action upon the expiration of one year (R. 5).

3. The policy declared on was void because of misrepresentations by the plaintiff as to the value of the vessel (R. 5).

4. The vessel was not a total loss and notwithstanding such fact the vessel was abandoned in violation of the terms of the policy (R. 5).

On October 27, 1923, the same day on which suit was brought, the plaintiff sued out ancillary writs of garnishment against each of the American Reinsurance Companies by affidavit in the Texas statutory form alleging that the garnishees were "indebted to" or had "in their hands effects belonging to" the Mexican In-

surance Company. Each of the reinsurance companies was incorporated under the laws of New York, had a permit to do business within the State of Texas, and had a local agent in Texas (R. 11-12, 55, 77, 82).

On March 5, 1923, on grounds not now material, the appellees Texas & Gulf Steamship Company and Suderman & Young, Inc., were permitted to intervene in these proceedings (R. 12).

On December 3, 1923, the two American Reinsurance Companies filed substantially identical answers to the writ of garnishment, alleging that they were not indebted to the Mexican Insurance Company and did not have possession of any effects of the Mexican Insurance Company (R. 14-16).

Over seven months later, on July 5, 1924, the plaintiff, Dick, filed substantially identical controverting affidavits to the answers of the American reinsurers (R. 17-19), alleging the reinsurance and that upon the loss of the vessel and by reason of the contract of reinsurance there became due and payable from the garnishees to the defendant Mexican Company the sum of $15,000 each, and that each garnishee "has in its possession the sum of Fifteen Thousand Dollars belonging to the said defendant" Mexican Insurance Company (R. 18, 19).

On January 14, 1927, the appellants, the American Reinsurance Companies, filed a joint garnishees' answer to the plaintiff's controverting affidavits, alleging that by the contract of reinsurance the garnishees were obliged to indemnify the Mexican Insurance Company

against liability; that the garnishees were entitled to urge any defense to the garnishment that the defendant, Mexican Insurance Company, might urge in that suit; and that the Mexican Insurance Company was not liable to the plaintiff on the grounds set forth in the Mexican Insurance Company's answer, *supra*, p. 6 (R. 20-22).

The plaintiff filed a general demurrer on January 14, 1927, to the garnishees' answer in the garnishment proceedings and an identical demurrer on July 26, 1927, to the answer of the defendant in the original proceeding (R. 22, 6), chiefly on the grounds that the statute of Texas prohibits a contractual limitation of less than two years and that the conditions of the policy, alleged as defenses, are in violation of the public policy of the State of Texas (R. 6, 23).

The District Court of Galveston County on July 26, 1927, entered similar judgments in the original and ancillary suits, reciting that a jury had been waived and the parties had agreed to submit all matters in controversy to the court, and ordering a judgment in favor of the plaintiff for $17,587.50 and in favor of the intervenors for $19,087.50 against the Mexican Insurance Company, and in favor of the plaintiff and the intervenors against The Home Insurance Company for $18,337.50 and against Franklin Fire Insurance Company for the same amount (R. 7-8, 23-25). These judgments were rendered on Judge Dibrell's findings of fact and conclusions of law dated July 26, 1927 (R. 8-11, 25-27).

The Mexican Insurance Company and the American Reinsurance Companies duly appealed from these judgments to the Court of Civil Appeals of Texas for the First Supreme Judicial District (R. 8, 25).

Upon affirmance of both judgments on April 19, 1928 (R. 42), the Mexican Insurance Company and the American Reinsurance Companies duly obtained a writ of error from the Supreme Court of the State of Texas (R. 75-76), which on April 10, 1929, entered a judgment affirming the judgments of the Court of Civil Appeals and the District Court (R. 76). It is from that judgment of the Supreme Court that this appeal is taken.

C. Opinions Below

The Court of Civil Appeals in its opinion by George W. Graves, associate justice (R. 43-56), held:

1. Article 1043 of the Mexican Commercial Code prescribing actions not brought within one year, which was incorporated by reference in the policy, is not enforcible in Texas, the public policy of which state as declared by statute and judicial decision being against such period of limitation (R. 50-51).

2. The quoted provision of the policy affecting the remedy only was not a substantive part of the agreement (R. 51-52). The court drew the following distinction:

> "stipulations for the giving of notice of a claim for damages under stated conditions constitute

> a valuable right going to the substance of the contract itself, while those merely undertaking to fix a limitation of time within which suit must be brought thereon are referable only to the mode of its enforcement in the courts of the country; as to the former, the lex loci contractus governs, as to the latter, the lex fori;" (R. 52).

3. As constitutional rights are not affected by statute affecting the remedy only, Article 5545 of the Revised Civil Statutes of Texas, 1925, quoted above at page 2, prohibiting the making of the stipulations in this policy of insurance, neither impaired the obligation of the contract nor deprived the appellants of property without due process of law under Article I, Section 10, paragraph 1, and Amendment XIV, respectively, of the Constitution of the United States and was, therefore, valid (R. 52-53).

4. Unless the parties continue to reside in the jurisdiction where the contract is made, the law of the forum controls all questions of limitation arising under a foreign contract or statute even though under such foreign contract or statute the debt is extinguished and not merely the remedy barred (R. 53-54).

5. The validity of the one-year limitation on the right created by the policy under the laws of Mexico, where it was made, does not make any difference because the provision is contrary to the expressed public policy of Texas (R. 54).

6. The court's finding that the vessel was a total loss was sufficiently sustained by the evidence (R. 55).

7. Although the contracts of reinsurance were clearly of indemnity against liability, "debts arose under them between the reinsurers and the original insurer immediately upon the happening of the loss by fire under the policy sued on" (R. 55), and, therefore, the garnishees being subject to the court's jurisdiction through local agents, judgment was properly rendered against all the defendants.

The judgment of the Supreme Court of the State of Texas was entered on the recommendation of the Commission of Appeals, Section A, which held, per Richard Critz, judge:

1. The contractual and statutory limitations lawful in the Republic of Mexico are unenforcible in Texas because contrary to the statutory law and public policy of that state; and all questions of limitation, irrespective of whether contractual or statutory, are determined by the law of the forum (R. 79).

2. There is no difference or distinction to be drawn between statutes of limitation and statutes of prescription so far as the application of the rule that the law of the forum governs, so that it does not make any difference whether the lapse of one year extinguished the cause of action or merely barred the remedy (R. 80).

3. Irrespective of whether the provisions of the Mexican Code extinguished the cause of action or merely barred the remedy, they come within the pro-

hibition of Article 5545 of the Revised Civil Statutes of Texas, 1925, and this statute is valid and cannot be avoided by anything in the contract (R. 80).

4. The application of Article 5545 to a contract validly made under the laws of a foreign country is not unconstitutional because there is no constitutional right in matters which are not a substantial part of the contract, and the contractual provisions in question are not substantial parts of the policy of insurance but affect the remedy only (R. 81).

5. If both parties had remained in the Republic of Mexico "until the bar of the statutes of that country had actually and fully operated, a different question would be presented" (R. 81).

6. Judgment was properly given against the American Reinsurance Companies because valid garnishments "impounded funds in this state in the hands of the two garnishees" and because "a debt arises between the original insurer and the reinsurer immediately upon the happening of a loss under an insurance policy" (R. 82).

III. JURISDICTION OF THIS COURT

A. Appeal

As set forth in the statement as to jurisdiction on appeal filed herein on August 9, 1929, it is believed that this court has jurisdiction of this appeal by virtue of Section 237(a) of the Judicial Code as amended by

the Acts of February 13, 1925, January 31, 1928, and April 26, 1928, *U. S. Code, 1926, Ti. 28, §§ 344, 861, 861(a), 861(b);* because the Supreme Court of Texas is the highest court of the State of Texas in which a decision in this suit can be had, and therein and in the courts below these appellants drew in question the validity of a statute of the State of Texas, to wit, Article 5545 of the Revised Civil Statutes of Texas, 1925, on the ground that it was repugnant to the Constitution of the United States, and the decision of each of said courts was in favor of its validity.

As the appellees have filed a motion to dismiss the appeal, the attention of the court is directed to the decisions believed to sustain jurisdiction, set forth in the statement as to jurisdiction filed herein. Following these the appellees' contention in their motion and the cases cited in support thereof will be referred to briefly.

Kans. City So. Ry. v. *Road Imp. Dist. No. 6,* 1921, 256 U. S. 658, was a writ of error to the Supreme Court of Arkansas, which had affirmed a road improvement assessment in accordance with the provisions of a state statute. Plaintiff-in-error maintained that the assessment violated the Fourteenth Amendment. This court held that, the state court having declared that the statute authorized the assessment and that so construed it was a valid enactment, the validity of the statute had been adequately challenged and the cause was properly here on writ of error. Pp. 659-660.

Dahnke-Walker Co. v. *Bondurant,* 1921, 257 U. S. 282, was a writ of error to the Court of Appeals of

Kentucky, which affirmed a directed verdict for the defendant in a contract action. A Kentucky statute prescribing the conditions on which foreign corporations might do business in that state, with which the plaintiff had not complied, was the basis of the defense. The Kentucky court, while conceding the invalidity of the statute as applied to inter-state commerce, held the transaction in question was not inter-state commerce and hence the statute was valid and enforcible. This court held on the jurisdictional question that "as the state court applied and enforced to the plaintiff's disadvantage a state statute which the plaintiff seasonably insisted as so applied and enforced was repugnant to the Constitution and void, the case is rightly here on writ of error." P. 290. That part of the opinion by Mr. Justice Van Devanter dealing with jurisdiction completely disposes of the appellees' motion to dismiss. Pp. 287-290.

Cudahy Co. v. *Parramore*, 1923, 263 U. S. 418, was a writ of error to the Supreme Court of Utah which affirmed a workmen's compensation award. The Utah compensation act provided for payment of compensation to an employee for injury or death by accident "arising out of or in the course of his employment." This employee was killed on his way to work. This court held the motion of the defendant-in-error to dismiss the writ was clearly without substance because

"By this construction and application of the statute we are bound and the case must be con

sidered as though the statute had, in specific terms, provided for liability upon the precise facts hereinbefore recited. *Ward & Gow* v. *Krinsky*, 259 U. S. 503, 510. The question saved in the state court and presented here is whether the statute, as thus construed and applied, is valid under the provisions of the Fourteenth Amendment." P. 422.

Irrespective of the particular questions involved, on the basis of which the appellees seek to distinguish the cases cited by the appellants, the challenge of the jurisdiction in those cases was disposed of on the basis of the following test, within which it is submitted the present case clearly falls:

"A decision of a state court applying and enforcing a state statute of general scope against a particular transaction as to which there was a distinct and timely insistence that, if so applied, the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is, therefore, reviewable by writ of error under §237 of the Judicial Code. *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, 288. The inquiry then is whether the statute is constitutional as applied and enforced in respect of the situation presented." *Fiske* v. *Kansas*, 1927, 274 U. S. 380, 385.

In their brief on jurisdiction, the appellees contend that the constitutional prohibition against a state impairing the obligation of contract refers only to legis-

lation enacted subsequent to the making of the contract in litigation. This is, of course, a correct statement in respect of statutes of the state in which a contract is made; but the principle underlying it is that the constitutional guaranty is directed against impairment "such as results from a subsequent exertion of the legislative power of the State," as stated in one of the cases cited by the appellees. *Cross Lake Club* v. *Louisiana,* 1912, 224 U. S. 632, 638.

The legislative power of Texas in the present case was exerted in respect of this contract at the time suit was brought and not before, because up to that time there was nothing upon which Texas could exert its legislative power, the contract being made and performed in Mexico and not concerned in any way with Texas.

The jurisdiction of this court does not depend on the form in which the legislative act is exerted, but rather upon its practical effect and operation as construed and applied by the state court of last resort. *Detroit United Ry.* v. *Michigan,* 1916, 242 U. S. 238, 247.

The prohibition of the Constitution against state legislation impairing the obligation of contract applies to all contracts wherever made and is not limited to contracts made within the bounds of the state whose legislation is drawn in question. *Western Nat. Bank* v. *Reckless,* 1899, 96 Fed. 70. In that case, a New Jersey statute was held to impair the obligation of a Kansas contract.

The point urged by the appellees, that since Article 5545 was enacted prior in point of time to the contract it cannot be contended to have impaired the obligation of contract as this could only be done by subsequent legislation, was considered in relation to foreign contracts valid where made by this court as early as *M'Millan* v. *M'Neill*, 1819, 4 Wheat. 209, 213, and *Ogden* v. *Saunders*, 1827, 12 Wheat. 213, 255. The opinion of Mr. Justice Washington in the latter case cited states that:

> "The principle alluded to was, that a state bankrupt law which impairs the obligation of a contract, is unconstitutional in its application to such contract. In that case, it is true, the contract preceded in order of time the act of assembly, under which the debtor was discharged, although it was not thought necessary to notice that circumstance in the opinion which was pronounced. The principle, however, remained, in the opinion of the court delivered in *M'Millan* v. *M'Neal*, unaffected by the circumstance that the law of Louisiana preceded a contract made in another State; since that law, having no extra-territorial force, never did at any time govern or affect the obligation of such contract. It could not, therefore, be correctly said to be prior to the contract, in reference to its obligation; since if, upon legal principles, it could affect the contract, that could not happen until the debtor became a citizen of Louisiana, and that was subsequent to the contract." P. 255.

With regard to *Aetna Life Ins. Co.* v. *Dunken*, 1924, 266 U. S. 389, more fully discussed hereafter, the appellees state at page 6 of their motion to dismiss that the question there raised was the endeavor of the state court to impress a subsequently passed penal statute of Texas upon a Tennessee contract. The contract in that case was entered into in December, 1910, p. 391, and the Texas statute which the Texas court held valid and applicable to this contract was approved March 22, 1909. *Gen. Laws, Texas, 1909, c. 108, §35.* This court did not base its decision either on the jurisdiction or on the merits on the ground that the legislation applied by the state court was enacted subsequent to the contract. In fact, neither the jurisdiction of this court nor the judgment of the court below were challenged upon the ground that the Texas statute was passed after the contract was entered into and a reference to the Texas statute shows that this was not the situation in fact. This court held that the judgment of the Texas court was erroneous in so far as it gave effect to the Texas statute, because the Texas statute cannot constitutionally be applied to a Tennessee contract, which is precisely the contention of the appellants in this case.

The only ground on which the distinction between prior and subsequent acts of the legislature as applied to foreign contracts might be maintained would be to give extra-territorial effect to the law of the forum. This was recognized and condemned by this court in *Aetna Life Ins. Co.* v. *Dunken*, 1924, 266 U. S. 389.

The appellees also attacked the jurisdiction on the ground that the only question involved is the public policy of the statute of Texas and the decision of its highest court construing such statute, and that the same does not involve the determination of a federal question. This contention is scarcely tenable by reason alone of the specific expression in the opinion of the Supreme Court of Texas that the unconstitutionality of Article 5545 was asserted by the appellants and that the statute was valid (R. 81).

Even assuming that Article 5545 is merely a pronouncement of the public policy of Texas and assuming that the construction of that statute by the Supreme Court of Texas is final, the cases cited by the appellees do not sustain their conclusion that the Texas court may determine the rights and obligations created by contract made and to be performed outside of Texas upon the basis of its local statute.

In the first case cited by the appellees, *Bond* v. *Hume*, 1917, 243 U. S. 15, a certified question was presented to this court whether the so-called Bucket Shop Law of Texas was so far a declaration of the public policy of that state as to prevent a federal court sitting in that state from entertaining a suit for breach of a contract dealing in cotton futures in New York, where it was valid. This court not only answered the certified question in the negative, but held that the state may refuse to enforce a valid foreign obligation only "where to do so would be repugnant to good morals, would lead to disturbance and disorganization of the local municipal law." P. 21.

The decision of this court in *Cross Lake Club* v. *Louisiana,* 1912, 224 U. S. 632, was that the decision below did not depend at all on the state statute in question and hence its validity was not drawn in question; and in the other cases cited by the appellees, the whole matter arose in one state so that the applicability of the Constitution depended on the effect of a subsequent statute on an earlier contract.

As opposed to the view taken by the appellees on the point of jurisdiction on the matter of applying a local law to a contract made and entered into in a foreign jurisdiction, this court in *Aetna Life Ins. Co.* v. *Dunken,* 1924, 266 U. S. 389, at page 394, stated, "The federal question presented arises from the ruling of the court that the Texas and not the Tennessee statute controls this contract."

The further contention of the appellees that the obligation of a contract is not impaired by a change in the remedy as long as an adequate remedy is saved the litigant, does not address itself to the contention of the appellants; for it is here urged in invoking the jurisdiction of the court not that a remedial right of the contract was altered, but that a substantial right of the contract to which both contracting parties had explicitly agreed, was impaired by the application of the Texas statute.

B. Certiorari

As a motion in this case, a petition for writ of certiorari has been filed under the provisions of the Judicial Code, Section 237(b), as amended by the Act of February 13, 1925. *U. S. Code, 1926, Ti. 28, §344.*

The application for a writ of certiorari is based on the following grounds:

1. The decision of the Supreme Court of Texas holding invalid the provisions in the policy limiting the time to sue thereon was erroneous, because Article 5545 of the Revised Civil Statutes of Texas, 1925, as construed and applied, violated paragraph 1 of Section 10 of Article I of the Constitution of the United States and Section 1 of Article XIV of the Amendments thereof.

2. The decision of the Supreme Court of Texas, holding invalid the provisions of the policy limiting the time to sue thereon because such provisions were contrary to the statute and public policy of the forum, is contrary to and in conflict with prior decisions of this court that the validity of a contract is determined by the law of the place where the contract is made and to be performed, and raises a federal question of substance.

3. The decision of the Supreme Court of Texas allowing a recovery against the American Reinsurance

Companies because at the time of the garnishment there was an existing debt due to the Mexican Insurance Company, whereby jurisdiction of the latter was obtained, on the authority of *Allemannia Ins. Co.* v. *Firemen's Ins. Co.*, 1908, 209 U. S. 326, was erroneous and was a misapplication of the doctrine of that case because the liability of the Mexican Insurance Company had not been established at the time of the garnishment and hence at that time a debt from the American Reinsurance Companies to the Mexican Insurance Company did not exist. The decision in this regard not only violates the constitutional rights of the American Reinsurance Companies under Section 1 of Article XIV of the Amendments of the Constitution of the United States, but also is in conflict with the decision of this court in *Morris & Co.* v. *Ins. Co.*, 1929, 279 U. S. 405, holding that no privity exists between the insured and the reinsurer.

4. The question of the liability of the American Reinsurance Companies is one of national importance and affects the entire business of reinsurance in the United States because the decision of the Supreme Court of Texas would permit the assured to hold the reinsurer directly liable by suing in any state where jurisdiction of the reinsurer could be obtained and where jurisdiction of the direct writing company could not be obtained by personal service.

IV. SPECIFICATION OF ERRORS

The appellants contend that by reason of each of the errors specified in the following paragraphs they have been deprived of their property without due process of law and have been deprived of the equal protection of the laws in violation of Section 1 of Article XIV of the Amendments of the Constitution of the United States; and that by reason of the errors specified in paragraphs 1 to 4 the State of Texas has impaired the obligation both of the contract of insurance and of their contracts of reinsurance in violation of paragraph 1 of Section 10 of Article I of the Constitution of the United States.

1. The Supreme Court of the State of Texas erroneously held Article 5545 of the Revised Civil Statutes of Texas, 1925, valid to change the terms and abrogate substantive provisions of the contract of insurance made and to be performed in Mexico, insuring a vessel located in Mexico and valid under the laws of Mexico.

2. The Supreme Court of Texas erroneously applied and enforced Article 5545 of the Revised Civil Statutes of Texas, 1925, as the law of the forum, against the express terms of the policy of insurance, valid by the laws of Mexico, where the contract was entered into and was to be performed.

3. The Supreme Court of the State of Texas erroneously held that jurisdiction had been acquired over the American Reinsurance Companies for the adjudication

of the liability of these appellants to the Mexican Insurance Company under contracts of reinsurance made and to be performed outside of Texas, relating exclusively to property permanently situated in Mexico, and not entered into in the course of the transaction of business in Texas by any of the insurance companies, party thereto.

4. The Supreme Court of the State of Texas erroneously held that the State of Texas could by means of statutes providing for garnishee process create a legal interest or property in the contracts of reinsurance in favor of the appellees herein, so as to permit the courts of Texas to adjudicate herein the liability of the Mexican Insurance Company to the assured and in addition adjudicate the liability of the American Reinsurance Companies to the Mexican Insurance Company, and upon such double adjudication to satisfy the first of such liabilities out of property found in the control of the Texas agents of the American Reinsurance Companies.

The relevant parts of the Constitution of the United States, relied on by the appellants, are as follows:

> "No State shall * * * pass any * * * Law impairing the Obligation of Contracts * * *." *Article I, Section 10, paragraph 1.*
>
> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Amendments, Article XIV, Section 1.*

V. ARGUMENT

Summary

The appellants contend that the limitation clause in the policy of insurance was a matter of substance and not of remedy; and that the rights of the parties were created by the contract, upon which the action is based, and were governed by the same instrument in so far as the rights created therein were limited ones. Being thus a matter of substantive contract and not of remedy, the rights are to be governed by the law of the place where the contract was made and was to be performed, that is Mexico. The case is not similar to one in which a statute of limitations is sought to be enforced but is analogous to one in which a right created by statute is controlled by the limitations contained therein.

The contrary public policy of a forum does not warrant a disregard of valid provisions of a contract, made and to be performed in another jurisdiction, when such provisions were neither criminal nor *mala in se*. The mere fact of the residence of the plaintiff within the forum does not warrant the application of the public policy of the forum to nullify a contract which was neither made nor to be performed within its jurisdiction.

The Texas courts, by holding the Texas statute here in question valid and applicable to the policy of insurance, have impaired the obligation of contract under the policy of insurance by impairing the means of enforcing its valid provisions. By giving extraterritorial

effect to the law of the forum and thus abrogating a valid defense to an action upon the policy of insurance, the Texas courts have deprived the appellants of property without due process of law, in violation of the Constitution of the United States.

The judgment of the Texas courts against the American Reinsurance Companies deprived them of property without due process of law in violation of the Constitution of the United States, as it was rendered without jurisdiction over these appellants. The Texas courts' jurisdiction in the garnishment proceeding was dependent upon the existence within the state of a debt, to form the basis for such an action *in rem*. No debt was owing by the American Reinsurance Companies to the Mexican Insurance Company at the time of the garnishment proceeding. Even though a debt had been owing, it was not a *res* within the jurisdiction of the Texas courts, so as to be the basis of jurisdiction in a garnishment proceeding.

FIRST POINT

THE "LIMITATION" CLAUSE IN THE POLICY WAS A MEASURE OF THE APPELLEES' RIGHTS THEREUNDER AND OF THE CORRELATIVE OBLIGATIONS OF THE MEXICAN INSURANCE COMPANY. IT WAS, THEREFORE, A SUBSTANTIVE PART OF THE CONTRACT, NOT MERELY A MATTER OF REMEDY.

By the terms of the contract the appellees' right was not to unconditional payment of a claimed loss but

only to payment of a contested loss if sued for within one year. Correlatively the Mexican Company's obligation to the appellees was not to pay any loss claim but to pay a loss claim if established in a suit begun within a year. The beginning of suit as provided for in the contract was thus by agreement of the parties made a factor for the measurement of the right of one party and the obligation of the other. It follows that the obliteration of the clause from the contract which has been effected by the decisions of the courts below constitutes an extension of the insurance company's obligation and the creation of a new right in the appellees, not provided in the contract.

It is difficult to understand the reasoning of the Texas Court of Civil Appeals in this case, affirmed by the Supreme Court, wherein a distinction is drawn between a stipulation limiting the time within which suit must be brought, held to be a matter of remedy only, and a stipulation limiting the conditions under which a notice of claim for damages must be given, held to constitute "a valuable right going to the substance of the contract itself" (R. 52). Stipulations of each type are inserted in contracts of carriage and insurance for similar reasons, namely, the absolute necessity of knowing without delay the nature and seriousness of claims and suits in order that timely investigation may be made, the question of liability reviewed while the facts are available and suitable defenses considered. It is of the utmost importance for an insurance company to know whether a contested claim is

going to be pressed seriously. The present case is a striking illustration of this. Substantial defenses to this cause of action relating to misrepresentation and abandonment for constructive total loss were alleged. These defenses were held by the trial court not to have been made out. It is quite possible that the insurer might have been able to produce the necessary evidence to make good these defenses if suit had been brought within one year as required by the policy.

This court has described the importance of such provisions as follows:

> "It is clearly for the interest of insurance companies that the extent of losses sustained by them should be speedily ascertained, and it is equally for the interest of the assured that the loss should be speedily adjusted and paid. The conditions in policies requiring notice of the loss to be given, and proofs of the amount to be furnished the insurers within certain prescribed periods, must be strictly complied with to enable the assured to recover. And it is not perceived that the condition under consideration stands upon any different footing. The contract of insurance is a voluntary one, and the insurers have a right to designate the terms upon which they will be responsible for losses. And it is not an unreasonable term that in case of a controversy upon a loss resort shall be had by the assured to the proper tribunal, whilst the transaction is recent, and the proofs respecting it are accessible." *Riddlesbarger* v. *Hartford Insurance Co.*, 1868, 7 Wall. 386, 390.

Both of the Texas appellate courts have construed Article 5545, Revised Civil Statutes, 1925, as providing for extraterritorial operation and effect. Both of said courts have then held that the statute so construed, is constitutional. The theory underlying both decisions is that questions of remedy only are involved. Upon this premise both courts have concluded that the reason constitutional rights are not violated is because neither the contract obligation which is impaired nor the property right of which the appellees have been deprived are substantive in character (R. 51-52, 80, 81).

Appellants do not question the soundness of the constitutional principle established by the cases cited by the Texas courts but they do contend that the courts below not only confused the criteria of substance and remedy but also failed to distinguish between rights created by contract and those created by statute.

Both courts treated the limitation provision in the contract of insurance as if it gave rise to no different constitutional rights than the statutory limitations contained in the Mexican Code. Neither court apparently gave any consideration to the view that the limitation clause in the insurance contract was a factor for measuring the rights and obligations of the parties to the contract and that the expiration of the contract limitation (without commencement of suit for a claimed loss) had the agreed effect of extinguishing the right of recovery under the contract.

A. *A limitation on a right created by contract, valid where made, is a substantive part of the contract and is not analogous to a general statute of limitation affecting remedy only.*

Exceptions to statutory limitations suspending their operation express a public policy in mitigating the severity of restrictions imposed by law. Such policy is not involved where the limitation is contractual and voluntary. Where a limitation is expressed in the contract, it is controlling if valid where the contract is made. Thus a clause restricting the time within which an action on an insurance policy may be brought is not subject to the express or common law exceptions to the statute of limitations. *Riddlesbarger* v. *Hartford Insurance Co.*, 1868, 7 Wall. 386; *Semmes* v. *Hartford Insurance Co.*, 1871, 13 Wall. 158; *Guthrie* v. *Indemnity Assn.*, 1899, 101 Tenn. 643; *Mead* v. *Insurance Co.*, 1904, 68 Kan. 432; *Suggs* v. *Insurance Co.*, 1888, 71 Tex. 579.

In *Riddlesbarger* v. *Hartford Insurance Co., supra*, a fire insurance policy contained a provision that no suit should be brought unless within one year after the occurrence of the loss or damage. A suit was brought within a year and was non-suited by the plaintiff. Relying on a statute of Missouri where the suit was brought, providing that if a plaintiff suffer a non-suit he may commence a new action within one year therefrom, the plaintiff brought a second suit. This court held that the limitation in the contract was a good defense be-

cause "the contract of insurance is a voluntary one, and the insurers have a right to designate the terms upon which they will be responsible for losses." P. 390. This court further held that it could not insert an exception covering the present situation, even with the assistance of the statute, without changing the contract, p. 391, and concluded that:

> "The commencement, therefore, of the present action within the period designated was a condition essential to the plaintiff's recovery; and this condition was not affected by the fact that the action, which was dismissed, had been commenced within that period." P. 392.

It is particularly to be noted that the statutory provision relied on in that case was one extending the time within which an action might be brought and was in the nature of an exception to a general statute of limitations; that such statutory extension was relied on as invalidating a limitation in the contract; and that the court specifically held that such statutory extension of the period generally limited did not invalidate the contract, which was a voluntary arrangement, before entering into which the insurers had the right to designate the terms upon which they would be responsible for losses.

Statutes of limitation being imposed by law are suspended where a disability imposed by law intervenes, so that the period of limitation is increased to the extent of the disability. The reason for this doctrine does not apply, however, to a contract limitation of time which

is not susceptible of enlargement by a disability. *Semmes* v. *Hartford Insurance Co., supra.*

In that case while there were other points involved, this court held that a contract limitation of twelve months within which to bring suit does not open and expand itself so as to receive within it a period of disability created by the Civil War. This court distinguished a contract limitation from a statutory limitation on the ground that a court has no right to construe a one-year limitation into a number of days equal to one year to be made up of days in an extended period in which the plaintiff could lawfully have commenced his action. P. 161.

In *Suggs* v. *Insurance Co.,* 1888, 71 Tex. 579, a limitation of one year in a life insurance policy was held a good defense although the plaintiffs were minors and could not have sued within the time limit. The Supreme Court of Texas held:

> "The validity of the provision in the policy sued upon in this case is not questioned, but it is insisted that the limitation, like that provided by the statute, does not run during the minority of the beneficiaries of the suit. This proposition, in our judgment, can not be maintained. The statute of limitations does not in any manner affect the question. The agreement is not merely to alter the rule of the statute by changing the time within which the action should be brought from four years to one year, leaving the limitation thus provided for subject to the statu-

tory conditions and exceptions. It makes no reference to the statute, but imposes a restriction upon the right of action entirely independent of it. It is said to differ from the statutory limitation in this, that it does not merely deny the remedy, but forfeits the liability when the suit is not brought within the stipulated time. (May on Ins., sec., 482, citing Williams v. Ins. Co., 20 Vt., 222.)

"The stipulation under consideration contains no exception in behalf of minors or other parties favored by the statute of limitations; and we see nothing in the nature of the contract to warrant us in engrafting an exception upon it by reason of mere analogy to these statutes. In this particular case the beneficiaries were but eleven and thirteen years old, respectively at the time the policy was issued. It was known to the assured that if a cause of action accrued to them at all, it must necessarily accrue during their minority. Under these circumstances, it is reasonable to presume that if it had been intended that the limitation contracted for should not run during their minority, it would have been so expressed in the policy." P. 581.

The incontestability clause in a life policy bars contest unless the insurer brings an affirmative action or files a defense within the time limited. *Humpston* v. *State Mut. Life Assur. Co.*, 1923, 148 Tenn. 439; *Mo. State Life Ins. Co.* v. *Cranford*, 1923, 161 Ark. 602.

The distinction between a statute of limitation affecting the remedy and a limitation in the contract creating the right itself is strikingly illustrated in *Williams* v. *Vermont Mutual Fire Ins. Co.*, 1848, 20 Vt. 222.

In that case a provision of the by-laws of the insurance company, constituting a part of the insurance contract, required that action must be brought at the next term of court after the directors disallowed a claim for loss in whole or in part. The directors disallowed the claim because one of the two persons insured had been accused of setting the premises on fire. Some time after "the next term of court" the directors paid to the innocent assured one-half the loss. It was contended that this was an acknowledgment or new promise which would open the limitation. The court held that the later payment could not have the effect of meeting the defense of the limitation because by the terms of the contract the liability itself was limited and "if the prescribed time be suffered to elapse without suit, there remains no longer a legal liability in any form." P. 231.

So in the present case, upon the expiration of one year there remained no longer any legal liability which might be revived by importation into Texas.

The view that the scope of the liability of an insurer is limited by an express stipulation, valid where made, as to the time of bringing suit as held in *Riddlesbarger* v. *Hartford Insurance Co.*, 1868, 7 Wall. 386, is also found in the leading case in New York State on that subject. *Williams* v. *Fire Association of Philadelphia*, 1907, 119 N. Y. App. Div. 573. In that case, in com-

menting upon the defense of such a provision to any action brought after the period covered by the statute, the court said:

> "By this clause in their contract the parties made compliance with the requirements in the policy and the commencement of the action within twelve months after the fire conditions precedent to the maintenance of the action." P. 574.

Decisions to the same effect on this precise question have been made by the highest courts of Missouri and North Dakota. *Dolan* v. *Royal Neighbors of America*, 1907, 123 Mo. App. 147; *Travelers Ins. Co.* v. *California Ins. Co.*, 1890, 1 N. D. 151.

In the Missouri case, the court held that such a limitation of time within which suit might be brought is a qualification of the rights created under the contract and as such does not pertain to the remedy and if valid in Illinois where made is valid in Missouri where suit was instituted. In that case the court said:

> "It is determined to be a provision which * * * imposes a restriction or qualification upon the rights vouchsafed in the contract entirely independent of the limitation statutes, * * * it operates in the nature of a condition precedent to forfeit the liability when suit is not instituted within the stipulated time." P. 156.

In *Travelers Ins. Co.* v. *California Ins. Co.*, 1890, 1 N. D. 151, a limitation on the time within which action might be brought on a policy, valid in the state where the contract was entered into, was held to extinguish the right and not merely bar the remedy.

B. *Similarly, where a right is created by a statute which includes a limitation upon the right, the expiration of the limitation has the effect not of merely barring the remedy but of extinguishing the right.*

The reason for the appellants' contention that the appellees' rights under the policy had no existence at the time suit was brought, namely, that the right created was a limited one by the terms of its creation, has been applied to new rights created by statute as well as to contract rights.

In *Davis* v. *Mills,* 1904, 194 U. S. 451, a Montana statute provided for certain liability upon the directors of corporations. The defendant became liable under this statute. Thereafter another statute limited actions to enforce certain statutory directors' liability which the court found included the liability of the defendant. In a suit in a United States District Court in the Second Circuit to enforce the Montana statutory liability against directors, the defendant set up the limitation. It was held that he might do so. Mr. Justice Holmes said at pages 453-454:

> "The general theory on which an action is maintained upon a cause which accrued in another jurisdiction is that the liability is an *obligatio,* which, having been attached to the person by the law then having that person within its power, will be treated by other countries as accompanying the person when brought before their courts. But, as the source of the obligation is the foreign law, the defendant, generally

speaking, is entitled to the benefit of whatever conditions and limitations the foreign law creates. *Slater* v. *Mexican National Railroad,* 194 U. S. 120. It is true that this general proposition is qualified by the fact that the ordinary limitations of actions are treated as laws of procedure and as belonging to the *lex fori,* as affecting the remedy only and not the right. But in cases where it has been possible to escape from that qualification by a reasonable distinction courts have been willing to treat limitations of time as standing like other limitations and cutting down the defendant's liability wherever he is sued. The common case is where a statute creates a new liability and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not. *The Harrisburg,* 119 U. S. 199. But the fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right."

The Harrisburg, 1886, 119 U. S. 199, cited by Mr. Justice Holmes, is an example of the familiar principle that where a death statute creating a right to recover for wrongful death includes a limit of time within

which suit thereunder must be brought, the right is extinguished upon the expiration of that time. The basis of this principle was thus stated by this court:

> "The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania, or the indictment in Massachusetts, could be maintained if brought or found after the expiration of the year, and it would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. It matters not that no rights of innocent parties have attached during the delay. Time has been made of the essence of the right, and the right is lost if the time is disregarded." P. 214.

Cf. *Phillips* v. *Grand Trunk Ry.*, 1915, 236 U. S. 662.

If the Texas courts take jurisdiction to enforce the policy, the right created by it must be taken "subject to the limitations which have been made a part of its existence."

SECOND POINT

A SUBSTANTIVE PROVISION OF A CONTRACT, VALID BY THE LAW OF THE PLACE WHERE THE CONTRACT IS MADE AND IS TO BE PERFORMED, CREATES A RIGHT OF PROPERTY ENFORCIBLE IN ANOTHER JURISDICTION, EVEN THOUGH THE LAW OF THE FORUM PROHIBITS SUCH A PROVISION.

Both of the courts below took the position that Article 5545 of the Revised Civil Statutes of Texas, 1925, was declaratory of the public policy of Texas and that as this statute prohibited contractual provisions, such as those in suit, limiting the right to sue, the validity of the provisions of the Mexican Insurance Company's policy under the law of the place where the contract was made did not make any difference. The Supreme Court of Texas held in addition that the limitation might have been good in Texas if both parties had remained in the Republic of Mexico until the expiration of a year after the occurrence of the loss (R. 81).

The general rule is that "the validity of a stipulation as to the time of bringing suit is governed by the law of the place where the contract was made." 7 Cooley, *Briefs on Insurance*, 2nd Ed., 6808. Cf. 2 May, *Insurance*, 4th Ed., 1139, §478.

According to the fundamental territorial theory of Anglo-Saxon law, the only sovereign which has jurisdiction to create legal obligations is the sovereign which has power over the parties and their acts. In the case

of a contract the only sovereign having power to create legal obligations out of the acts done by the parties to the contract is the sovereign of the place where they act, namely, the place where the contract was entered into. Hence, validity is determined by that law. *Scudder* v. *Union National Bank*, 1875, 91 U. S. 406. The only sovereign which has jurisdiction to create a status is the sovereign having jurisdiction over the parties to the status.

This general rule applies to insurance contracts. *Equitable Life Society* v. *Clements*, 1891, 140 U. S. 226; *Northwestern Life Ins. Co.* v. *McCue*, 1912, 223 U. S. 234. The apparent exception in the case of insurance benefit certificates issued by fraternal organizations is due to the fact that in addition to the contract a relation or status is created, of which the contract is an incident. The validity of such a contract as an incident of the status is determined by the law of the domicile, which in the case of such fraternal organizations is the place where the corporation is incorporated. *Royal Arcanum* v. *Green*, 1915, 237 U. S. 531, 542; *Modern Woodmen* v. *Mixer*, 1925, 267 U. S. 544.

In either case, once the validity of the contract is determined, its obligation will be enforced even though the law of the particular forum in which suit happens to be brought is contrary and even though the contractual provision is contrary to the public policy of that forum. *Loucks* v. *Standard Oil Co.*, 1918, 224 N. Y. 99.

In that case Judge Cardozo said with respect to the enforcement of a right valid where created:

> "The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep rooted tradition of the common weal." P. 111.
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> * * * * * *
>
> "The fundamental public policy is perceived to be that rights lawfully vested shall be everywhere maintained." P. 113.

In *N. Y. Life Ins. Co.* v. *Head*, 1914, 234 U. S. 149, a suit was brought in the Missouri state court to recover the full amount of a life insurance policy which had been settled in accordance with the terms of a loan agreement and with the law of New York where the company was incorporated and where the loan agreement was made. At the time the policy was written a Missouri statute required the insurer to apply a certain part of the accumulated surplus for the payment of temporary insurance. If this had been done, the amount would have been sufficient to extend the insurance in the full amount of the policy beyond the date of the death of the assured. The defense asserted the validity of the settlement in New York under the loan agreement and urged that the Missouri statute could not be applied without depriving the company of due process under the Fourteenth Amendment and impair-

ing the obligation of contract contrary to Article I, Section 10, of the Constitution of the United States.

The Supreme Court of Missouri in affirming judgment for the plaintiff held that the agreement and settlement made in New York were controlled by the Missouri statute and were, therefore, void; and that the Missouri statutes were declaratory of the public policy of the state and were, therefore, effective to annul all stipulations which offended the provisions of the statute.

This court in reversing the judgment said:

> "And this concession brings us to consider the second general inquiry which is the power of the State of Missouri to extend the operation of its statutes beyond its borders into the jurisdiction of other States, so as in such other States to destroy or impair the right of persons not citizens of Missouri to contract, although the contract could in no sense be operative in Missouri and although the contract was sanctioned by the law of the State where made. That is to say, the right of a State where a contract concerning a particular subject-matter not in its essence intrinsically and inherently local is once made within its borders not merely to legislate concerning acts done or agreements made within the State in the future concerning such original contract, but to affect the parties to such original contract with a perpetual contractual paralysis following them outside of the jurisdiction of the State of original contract by prohibiting them from doing any act or making any agreement concerning the original contract not in accord with the law of the State where the contract was originally made." Pp. 160-161.

The Missouri Supreme Court held that as foreign insurance companies had no right to come into Missouri except in accordance with the terms of the permission given by the state, the limitations of the Missouri law apply to foreign corporations, deprive them of any power not enjoyed by domestic companies, and render void or inoperative any conditions in policies or contracts made by them inconsistent with the Missouri laws. With respect to this contention this court held that although in view of the power of a state over insurance, by which it might impose conditions as to business within the state which foreign corporations might do, a state may not thereby acquire the right to assert an authority beyond its borders which it cannot exercise consistently with the constitution.

In *Mut. Life Ins. Co. of New York* v. *Cohen*, 1900, 179 U. S. 262, suit was brought in the United States District Court for the District of Washington on a policy entered into in Montana. By the terms of the policy failure to pay the annual premium worked a forfeiture of all claims against the insurer, which was incorporated in New York, where a statute prohibited forfeiture for non-payment of premium. This court held that the New York statute did not control and that the forfeiture provision in the policy would be enforced in the Washington suit because it was valid under the law of Montana, the place where the contract was entered into. The court said:

> "Undoubtedly a foreign insurance company making a contract within the State of New York

would find that contract burdened by its [the statute's] provisions, and equally clear is it that such company making a contract in another State would be free from its limitations." P. 265.

In *Bond* v. *Hume*, 1917, 243 U. S. 15, suit was brought in the United States District Court for the Western District of Texas on a contract made in New York between a citizen of New York and a citizen of Texas for the sale of cotton for future delivery in accordance with the Exchange rules valid under the laws of New York, but contrary to a Texas statute. The Circuit Court of Appeals for the Fifth Circuit certified to this court the question whether the Texas Bucketshop Law or public policy therein declared, prevented the trial court from granting the relief which the parties would otherwise be entitled to have. This court answered this question in the negative, and held that the validity of the contract under the law of the place where it was entered into and executed "was not and could not be affected by the laws of the State of Texas, as in the nature of things such laws could have no extra-territorial operation." P. 20.

An earlier decision of this court, already discussed under the First Point, is to the same effect. *Davis* v. *Mills*, 1904, 194 U. S. 451.

Similarly, it was held in *Converse* v. *Hamilton*, 1912, 224 U. S. 243, that a right validly created by a Minnesota statute would be enforced in Wisconsin although contrary to the public policy of that state.

New York Life Ins. Co. v. *Dodge,* 1918, 246 U. S. 357, involved the validity of the terms of a loan agreement, made in New York, which were contrary to a Missouri statute, under circumstances similar to those in *N. Y. Life Ins. Co.* v. *Head,* 1914, 234 U. S. 149, *supra,* p. 41. The Missouri Supreme Court affirmed the judgment for the plaintiff and the case came to this court on writ of error.

This court held that the policy was a Missouri contract subject to the statutes of Missouri so far as valid and applicable; and that the loan contract was a separate agreement made in New York of a kind which no state by direct action may prohibit a citizen within her borders from making outside of them. In view of the Missouri statute there was no obligation on the company to make the loan and, hence, the loan contract actually consummated was a voluntary one which the company had not already obligated itself to make upon demand. After reviewing the power of Missouri to regulate the conditions on which a foreign insurance corporation might do business in Missouri, the court said:

> "Under the laws of New York, where the parties made the loan agreement now before us, it was valid; also it was one which the Missouri legislature could not destroy or prevent a citizen within its borders from making beyond them by direct inhibition; and applying the principles accepted and enforced in *New York Life Insurance Co.* v. *Head,* we think the necessary conclusion is that such a contract could not be indirectly brought into subjection to statutes of the State

> and rendered ineffective through a license authorizing the insurance company there to do business. As construed and applied by the Springfield Court of Appeals, §7897 transcends the power of the State. To hold otherwise would permit destruction of the right—often of great value—freely to borrow money upon a policy from the issuing company at its home office and would, moreover, sanction the impairment of that liberty of contract guaranteed to all by the Fourteenth Amendment." Pp. 376-377.

The situation in the *Head* and *Dodge* cases and the position taken in each by the Missouri Supreme Court are strikingly similar in all essential particulars to the situation in the case at bar and the decision of the Supreme Court of Texas.

The principle has also been pointed out by the Court of Appeals of Kentucky in two similar cases: *Clarey* v. *Union Central Life Ins. Co.*, 1911, 143 Ky. 540; and *Union Central Life Ins. Co.* v. *Barnes*, 1917, 175 Ky. 364. In each of these cases a suit was brought on a life insurance policy providing that no action should be maintained after one year from the date of death of the assured. Such a provision was valid under the law of the state in which each policy was entered into but contrary to the public policy of Kentucky where suit was brought, where the statutory limitation was fifteen years. In each case the assured before his death moved into Kentucky. In both cases it was held that as the validity of the contracts is to be determined by the law of the place where it is entered into, the con-

tractual provision was valid and effective to defeat recovery.

In the later case, the court said:

> "* * * this court was constrained to abide by the rules of comity, always recognized and enforced here, as elsewhere, rather than to impress its peculiar views upon a foreign contract subjected to litigation here. * * * the public policy of the state is not affected or infringed by the making of such a contract elsewhere, and under the rules of comity, we are bound to enforce a contract valid where made. Any other position would be at variance with all authority and entirely indefensible. *Under this view it is immaterial that appellee, when the cause of action accrued, and when the suit was filed, was a resident of this state.*" (Italics ours.)
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> * * * * * *
>
> "It is also argued for appellee, that the question of limitation is one of remedy, governed by the *lex fori* rather than the *lex loci contractus*, and this would be true, if the question were one as to which statute of limitation should apply, whether of the state where the contract was made or of the state where the remedy is sought to be enforced; but such is not the case here, since the statutes of limitations of the respective states are not involved, but only the validity of the contract itself." P. 367.

C. J. Dick's residence in Texas at the time of the alleged loss has been urged as a reason for the application of the Texas law and both of the courts below

deemed this circumstance of importance (R. 53-54, 80, 81). The circumstance of Dick's residence, however, is entirely immaterial when it is considered that the party urging the application of the law of the forum was a resident of the jurisdiction of the forum at the time the contract was entered into in *Bond* v. *Hume*, 1917, 243 U. S. 15, *New York Life Ins. Co.* v. *Dodge*, 1918, 246 U. S. 357; and at the time of accrual of the right and also at the time suit was brought in *Bond* v. *Hume*, 1917, 243 U. S. 15, *New York Life Ins. Co.* v. *Dodge*, 1918, 246 U. S. 357, *Aetna Life Ins. Co.* v. *Dunken*, 1924, 266 U. S. 389, *Clarey* v. *Union Central Life Ins. Co.*, 1911, 143 Ky. 540, *Union Central Life Ins. Co.* v. *Barnes*, 1917, 175 Ky. 364. Among the cases cited in this Point the assured was a non-resident of the state where suit was brought only in *N. Y. Life Ins. Co.* v. *Head*, 1914, 234 U. S. 149, *Mut. Life Ins. Co. of New York* v. *Cohen*, 1900, 179 U. S. 262.

It is apparent from the cases cited by the courts below that the Supreme Court of Texas failed to distinguish between the effect on a contract of adverse public policy of the place where the contract was to be performed and adverse public policy of the law of the forum. Owing to the fact that suit is frequently brought in the courts of the jurisdiction where a contract is performed, it is usually not necessary to draw any distinction because it is well-settled that if the performance of a contract is against the public policy of the jurisdiction where it is to be performed, it will not be enforced. *Knott* v. *Botany Mills*, 1900, 179 U. S. 69; *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 1889, 129 U. S. 397.

Thus the decision of this court in *Knott* v. *Botany Mills, supra,* was cited as authority for the proposition that a contractual provision contrary to the public policy of the forum will not be enforced.

In that case the principal question related to the construction of Sections 1 and 3 of the Harter Act and the application of that Act to voyages from foreign ports to the United States. The bill of lading contained a clause invalid under the Harter Act which had to do with the performance. The contract, being one of carriage from Buenos Aires to New York, was partly to be performed within the United States. The ground of the decision, holding that the Harter Act applied and that the negligence clause in the bill of lading would not be enforced, was that such provision was invalid by the law of the place of performance. It was not suggested and this court did not hold that the defense was not available because contrary to the law of the forum, although that was incidentally the fact, because the forum and the place of performance happened to be the same jurisdiction.

The distinction becomes clear upon examination of similar cases of ocean carriage raising the question of validity of bill of lading clauses, where the suit is brought in a jurisdiction other than that of performance.

A negligence clause in a bill of lading similar to that in question in *Knott* v. *Botany Mills, supra,* was upheld in two cases in the United States courts, where the voyage or any other part of the performance of the contract did not take place in the United States. *The*

Fri, C. C. A. 2nd, 1907, 154 Fed. 333, certiorari denied 210 U. S. 431; *The Miguel di Larrinaga*, 1914, 217 Fed. 678.

In *The Miguel di Larrinaga* the voyage was from Liverpool to Cuban ports and the bill of lading was thus entered into in England for performance in Cuba. The negligence clause was valid by the laws of England and Cuba, but plainly contrary to the Harter Act. In a suit on the bill of lading in the Southern District of New York, Judge Hough held the carrier entitled to assert the negligence clause in the bill of lading as a defense; because, as stated in the syllabus by the court, "A contract valid where made is valid everywhere unless contrary to the public policy of the place of performance; and the law of the forum is immaterial, if a contract is valid where made and where it is to be performed." P. 678.

In *The Fri, supra,* cargo was shipped from Carthagena, U. S. of Colombia, to Cienfuegos, Cuba, under shipping documents containing a negligence clause valid by the law of Colombia but contrary to the public policy of the forum as established by the Harter Act. The Circuit Court of Appeals for the Second Circuit held that by the decisions of the federal courts negligence clauses in a contract of carriage made in this country or made abroad and to be performed here are contrary to public policy; that the law of the place where a contract is made governs its nature, obligation and interpretation; and that a contract valid in the state where it is made will be enforced in a state by whose law it is invalid, even though the contract contravenes a statute

of the state in which suit is brought. The court further stated that none of the adjudications in the federal courts refused to enforce such a stipulation in cases where the contract of affreightment was lawful where made and when no part of it is to be performed in this country. The court concluded as follows:

> "We are unable to appreciate how a contract made in a country where it is valid, no part of which is to be performed in this country, and relating to the transportation of property on a foreign vessel on a voyage which does not include an American port, can be one which particularly concerns the public policy of the United States. When the parties to such a contract choose to resort to the courts of this country to enforce it, there seems to be no sound reason, as there certainly is no direct authority, for deciding that the contract shall not be enforced in substance and effect as they agreed." P. 338.

In *The Trinacria*, 1890, 42 Fed. 863, Judge Addison Brown held:

> "It is no part of the law or policy of this country to invalidate the contracts of parties lawfully made abroad, so far as respects performance there, or to apply our law to the consequences of such performance there, the acts being neither criminal, by our law, nor *mala in se*. It is a wholly different question whether the courts of this country should sustain contracts or stipulations, as regard acts performed and designed to be performed, either on the high seas or within the exclusive jurisdiction of this country, when such stipulations are by our law void on grounds of public policy." P. 864.

THIRD POINT

THE APPLICATION OF ARTICLE 5545 OF THE TEXAS REVISED CIVIL STATUTES, 1925, TO ABROGATE A VALID PROVISION IN A FOREIGN CONTRACT IMPAIRS THE OBLIGATION OF CONTRACT, DEPRIVES OF PROPERTY WITHOUT DUE PROCESS OF LAW, AND DENIES EQUAL PROTECTION OF THE LAWS, CONTRARY TO THE CONSTITUTION OF THE UNITED STATES.

By applying its local statute to this contract the Supreme Court of Texas has treated the Legislature of the State of Texas as intending to legislate with regard to the rights of Dick and the Mexican Insurance Company, who entered into a transaction in Mexico, and also with regard to the rights of the Mexican Insurance Company and the reinsurers, who entered into a reinsurance contract in the State of New York.

Under the decision of the Supreme Court of Texas, Article 5545 R. C. S. Texas, 1925, is construed as if it read: "No person, firm or corporation, association or combination of whatsoever kind shall enter into, *either in this state or elsewhere,* any stipulation, contract or agreement *performable within or outside of this state* by reason whereof the time in which to sue thereon is limited to a shorter period than two years. And no stipulation, contract or agreement *made either in this state or elsewhere, performable either here or elsewhere,* for any shorter limitation in which to sue shall ever be valid in this state."

The case must be considered as if the statute read thus. *Ward & Gow* v. *Krinsky*, 1922, 259 U. S. 503, 510; *Cudahy Co.* v. *Parramore*, 1923, 263 U. S. 418, 422.

But both the Mexican Insurance Company's and the reinsurers' rights were measured by the terms of the contracts which created them and after the expiration of one year the appellees' rights were gone. For the Texas court to apply its own statute and, as a necessary consequence of so doing, to refuse to recognize the existence of the defense pleaded is to give to the Texas statute a construction which would make it unconstitutional as bringing about a deprivation of property without due process.

Impairment of the obligation of contract forbidden by the Constitution has been defined in *Louisiana* v. *New Orleans*, 1880, 102 U. S. 203, 206-207:

> "The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced, by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation."

The application of Article 5545 to the Mexican contract of insurance falls directly within the prohibition here defined. It denied the defendants' right to force the plaintiff to carry out his express agreement not to bring suit after one year from the date of the loss.

Such action by the Supreme Court of Texas is action by "a state" within the meaning of the constitutional prohibitions. *Ex parte Virginia*, 1879, 100 U. S. 339, 346-347; *Old Wayne Life Assn.* v. *McDonough*, 1907, 204 U. S. 8, 23.

While many of the cases already cited were decided upon the full faith and credit clause of the Constitution, the principle here involved goes much further, for a state cannot consistently with the Constitution of the United States destroy a contract right validly created in another jurisdiction. Such extraterritorial operation of a statute as was upheld by the Supreme Court of Texas has been condemned by this court in *N. Y. Life Ins. Co.* v. *Head*, 1914, 234 U. S. 149, where an attempt to extend to a valid contract made in another state regulatory insurance statutes of the forum, of a remedial nature was held a violation of the constitutional right in freedom of contract and a deprivation of property in contravention of the constitutional provisions guaranteeing due process. The facts have already been stated.

This court in its opinion of reversal said:

> "In other words, concretely speaking we must consider the validity of the loan agreement, that is, how far it was within the power of the State of Missouri to extend its authority into the State of New York and there forbid the parties, one of whom was a citizen of New Mexico and the other a citizen of New York, from making such loan agreement in New York simply because it modified a contract originally made in Missouri.

Such question, we think, admits of but one answer since it would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State and in the State of New York and there destroy freedom of contract without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound. The principle however lies at the foundation of the full faith and credit clause and the many rulings which have given effect to that clause.

"It is illustrated as regards the right to freedom of contract by the ruling in *Allgeyer* v. *Louisiana*, 165 U. S. 578, and it finds expression in the decisions of this court affirmatively establishing that a State may not consistently with the due process clause of the Fourteenth Amendment extend its authority beyond its legitimate jurisdiction either by way of the wrongful exertion of judicial power or the unwarranted exercise of the taxing power." Pp. 161-162.

The distinction that in the above case the insured was a non-resident of the state of the forum is unsound for in a latter case, *New York Life Ins. Co.* v. *Dodge*, 1918, 246 U. S. 357, under similar facts, the insured was a citizen of Missouri, the state of the forum, and this court again held unconstitutional the application of

the statute of the forum to a foreign contract valid where made.

In *Aetna Life Ins. Co.* v. *Dunken*, 1924, 266 U. S. 389, the defendant, a Connecticut insurance company, doing business in Texas, issued an insurance policy on the life of a citizen of Tennessee. The policy was for a seven-year term and provided that at the option of the insured it could be converted into a twenty payment life upon specified conditions. Through a Tennessee agent of the defendant the assured, who in the meantime had moved his residence to Texas, applied for a conversion in accordance with the conditions of the contract. The defendant sent the substituted policy to the Tennessee agent, who mailed it in Tennessee to the assured in Texas. Upon the death of the assured his representative demanded payment and sued the defendant in the Texas state court.

A Texas statute in force at the time the contract was entered into provided that in the event of loss under an insurance contract, failure to pay within thirty days after demand should render the insurance company liable to pay the policyholder additional damages of 12% of the loss and attorneys' fees. The Texas court rendered judgment for the plaintiff in accordance with this provision of the Texas statute.

In this court on writ of error, it was urged that the contract was a Tennessee or Connecticut contract and since there was no provision in such states for the additional damages or attorneys' fee, the Texas statute as construed and applied violated the contract impair-

ment clause, the full faith and credit clause and several clauses of Article I of the Fourteenth Amendment of the Constitution.

This court held that (1) the substituted policy was a contract made in Tennessee because it was issued in discharge of a pre-existing obligation under the original Tennessee contract, and (2) the state court's application of the Texas statute to a contract made in Tennessee was in violation of the contract impairment, full faith and credit and due process provisions of the Constitution, because the Texas statute as construed and applied by the Texas court attempted to bring within the jurisdiction of Texas persons or subject-matter properly without the state and thus to deprive them of property without due process of law.

It will be seen that in the above case, as in the instant proceeding, the insured was a resident of the State of Texas at the time of the accrual of the obligation for which a suit was brought in the Texas courts. The statutory provision in that case providing that all contracts entered into with citizens of the State of Texas should be regarded as Texas contracts or declaratory of the public policy of the state as was the provision for additional damages for delinquent payments. These statutory provisions were in existence in Texas at the time that the original contract of insurance was entered into. In spite of the remedial aspect of the statute this court held the law of the forum could not constitutionally be applied to control the terms of a valid foreign contract.

Cf. *Allgeyer* v. *Louisiana*, 1897, 165 U. S. 578.

FOURTH POINT

THE JUDGMENT OF THE TEXAS COURTS AGAINST THE AMERICAN INSURANCE COMPANIES AS GARNISHEES WAS RENDERED WITHOUT JURISDICTION AND, THEREFORE, DEPRIVED THESE APPELLANTS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

A. *At the time of the garnishment there was no debt owing by the American Reinsurance Companies to the Mexican Insurance Company.*

The Texas Supreme Court held that there was a debt due from the American Reinsurance Companies to the Mexican Insurance Company at the time of the garnishment for the reason that "a debt arises between the original insurer and the reinsurer immediately upon the happening of a loss under an insurance policy," citing *Allemannia Ins. Co.* v. *Firemen's Ins. Co.*, 1908, 209 U. S. 326 (R. 82).

That decision, however, does not go so far. The issue in that case was not whether the liability of the reinsurer arises upon happening of the loss, irrespective of whether liability is disputed, but only whether the liability of the reinsurer is conditioned upon the actual payment of the loss. In that case the liability of the direct writing company was admitted and the question before the court was whether, in the case of an admitted liability by the direct writing company to pay the loss to the assured, it was necessary that the admission

should be followed by actual payment before enforcing the reinsurer's undertaking to contribute. The decision was that the reinsurer's undertaking was to indemnify against liability as distinguished from indemnification against loss or payment, an obviously different thing from a holding that the happening of a loss alone creates a debt from the reinsurer to the direct writing insurance company.

In the *Allemannia* case this court considered the general nature of transactions known as reinsurance. Had it been necessary to do so in that case, the court undoubtedly would have considered the question of the obligation of the reinsurer in a situation such as is presented in the case at bar where the liability of the direct writing company to the insured is not admitted, but, on the contrary, is contested. In this case the existence of a dispute as to the liability of the direct writing company is obvious from the fact that the assured had demanded payment of the loss in question and that the Mexican Insurance Company had refused for over six years to make payment (R. 9). The demand of the assured was not made the subject of a suit by the assured in Mexico and the reason therefor may be suggested by the fact that in the case before the Texas court, two defenses on the merits were set up on behalf of the Mexican Insurance Company, and, in addition, the defense that the assured had let his rights lapse by failing to bring proceedings within the year provided by the terms of the insurance contract.

If the court will now consider the nature of the transaction known as reinsurance in its relation to the facts in this case where liability of the direct writing company has been consistently disputed and is still disputed, as distinguished from the facts in the *Allemannia* case where the direct writing company stood before the court admitting its liability, the court will, no doubt, conclude that the language quoted above from the *Allemannia* case, while expressing accurately the legal principle necessary to that decision, cannot be accepted as applicable to cases of disputed loss without material qualification or explanation.

The undertaking of a reinsurance company is frequently expressed, in the parlance of the insurance business, as to "follow the fortunes" of the direct writing company in reference to the policy of insurance. By the customs of the business which are inherent in the nature of reinsurance, the direct writing company is authorized to determine all questions in connection with claims for losses. It may admit liability or deny it; it may defend litigations or it may settle them. All such decisions, in the absence of fraud, are binding upon the reinsurer.

The reinsurer is also accorded a *pro rata* affirmative right to the benefits which the direct writing company may secure for itself, such as salvages or recoveries. Consequently, it can be said only in a relative rather than in an absolute way, that the debt arises between the original insurer and the reinsurer immediately upon the happening of a loss. It is true that the obligation

of a reinsurer, as also of the direct insurer, if and when established, relates back to the loss. But it is not true to say that the loss establishes the liability of the reinsurer in cases where the direct insurer has not caused its own liability to be established, either by admission binding upon the reinsurer, or by judgment.

The statutes of Texas as to garnishments, *R. C. S., Texas, 1925, Title 68,* do not differ from the usual statutes as to that subject. They refer throughout to "debt" and "indebtedness." *R. C. S., Texas, 1925, Arts. 4078, 4079, 4081, 4084, 4088.* The Texas courts hold that claims which are not liquidated so that the garnishee may compute and return the amount of the demand cannot be garnished. *Waples-Platter Grocer Co.* v. *Texas & Pacific Ry. Co.*, 1902, 95 Tex. 486; *Armengol* v. *Richter*, 1911, 141 S. W. 1028.

In this situation, it is claimed that a debt did not arise between the insurer and the reinsurer upon the happening of a loss; that if the direct insurer had sued the reinsurers upon the contract of reinsurance the defense would have been available that no liability had arisen as between the parties to the contract. It follows that as it was necessary for the Texas court to find at the time of the garnishment an existing debt liquidated in amount in order to support its garnishee process, that court erred in its determination that there was such a debt in existence.

Thus without a judgment against the Mexican Insurance Company, or any admission of liability by it, the American Reinsurance Companies owed it nothing

and, therefore, could not have anything to be garnished; but without a seizure by garnishment against the American Reinsurance Companies there would have been no way of obtaining a judgment against the Mexican Insurance Company.

Thus in rendering judgment against both the Mexican Insurance Company and the American Reinsurance Companies the court below reached this result by assuming the indebtedness in order to justify jurisdiction and judgment against the Mexican Insurance Company, and then having thus established such judgment by assumption, proceeded to conclude that therefore the American Reinsurance Companies were indebted to the direct writing company. The opinion of the Texas Supreme Court states that valid garnishments impounded funds in the hands of the two garnishees (R. 82). This may be true enough but the funds impounded were those belonging to the garnishees. In the nature of things the funds could not have been funds belonging to the Mexican Company.

In view of the fact that the transaction was entered into, was to be performed, and related to property, outside of Texas, and further considering that the reinsurance contracts were entered into and were to be performed outside of Texas and had no connection whatever with anything done or to be done by the Mexican Company or the American Reinsurance Companies in Texas, the case presents an extremely unjust application of the garnishment principle.

B. *Assuming that, at the time of the garnishment, an indebtedness from American Reinsurance Companies to the Mexican Insurance Company was in existence, it was not a res within the jurisdiction of the Texas courts.*

Service of process was had upon the local Texas agents of the two American Reinsurance Companies (New York corporations) not for the purpose of subjecting those companies to the general jurisdiction of the court in order that any legal liability running against them in favor of the plaintiff might be asserted. There was no such liability for the reason that there was no contract between the plaintiff and the Reinsurance Companies. The right of the plaintiff asserted in the action was, of course, a right against the Mexican Insurance Company only. The making of reinsurance contracts between the Mexican Insurance Company and the American Reinsurance Companies created no privity between the plaintiff and the American Reinsurance Companies. *Morris & Co.* v. *Ins. Co.*, 1929, 279 U. S. 405.

The purpose of serving the local agents of the American Reinsurance Companies was to accomplish, by indirection, that which might have been directly accomplished had there been a privity of contract between the plaintiff and the American Reinsurance Companies. Thus the agents were served for the purpose of drawing the corporate debtor into the Texas jurisdiction in order that the debt might be there and thus subject to process *in rem*. The question thereupon arises whether that

purpose was accomplished. This question is to be answered by a consideration of the principles of the law as to conflict of jurisdiction and as to *situs* of intangible choses in action.

An unusually satisfying discussion of these principles is contained in the opinion of Chief Judge Andrews of the Court of Appeals of the State of New York in the case of *Douglass* v. *P. Ins. Co.*, 1893, 138 N. Y. 209, which was referred to with approval but distinguished by this court in *Harris* v. *Balk*, 1905, 198 U. S. 215 at 225.

The pertinent facts of the *Douglass* case were as follows: Plaintiff, a resident of New York, sued the defendant, a New York insurance corporation, for the recovery of a loss under a policy of fire insurance on property situated in New York. The defendant insurance company pleaded in abatement in substance that it was carrying on business and maintained an agency in the State of Massachusetts; that pursuant to the laws of that state it had appointed an attorney therein upon whom process could be served; that prior to the commencement of the New York action an action was begun in Massachusetts by creditors of the plaintiff residing in that state against the plaintiff and the defendant, and that therein the debt owing by the defendant had been attached by service of trustee process upon the agent of the insurance company in Massachusetts, but without personal service of the plaintiff in the New York case, who was a co-defendant in the Massachusetts case. A demurrer to this plea was sustained in the lower courts

of New York and the judgment affirmed by the unanimous decision of the Court of Appeals.

In the course of the opinion Judge Andrews said:

> "But attachment suits partake of the nature of suits *in rem*, and are distinctly such when they proceed without jurisdiction having been acquired of the person of the debtor in the attachment. Real and personal property may be subjected to seizure and sale for the payment of debts of the owner, according to the laws of the state or sovereignty where the property is, having regard to the fundamental condition that due process of law shall precede the appropriation. It is undeniable that a state may authorize the seizure and sale by means of appropriate judicial proceedings of property of non-residents within the jurisdiction for the payment of their debts. There must be notice and an opportunity to be heard, either actual or constructive, in such way and form as the law may prescribe. But no state can subject either real or personal property out of the jurisdiction to its laws. It may, and often does, compel persons, through the process and judgment of its courts, to perform acts which affect their title and interest in and to property outside of the limits of the state. Having acquired jurisdiction of the person, the courts can compel observance of its decrees by proceedings *in personam* against the owner within the jurisdiction. But it is a fundamental rule that in attachment proceedings the *res* must be within the jurisdiction of the court issuing the process, in order to confer jurisdiction. (*Plimp-*

ton v. *Bigelow,* 93 N. Y. 593.) In the case of moveables their seizure under the attachment shows that their actual situs is within the jurisdiction. But in respect to intangible interests, debts, choses in action, bonds, notes, accounts, interests in corporate stocks and things of a similar nature, the question whether the *res* is within the jurisdiction of the sovereignty where the process is issued, is not so readily determined. The general rule is well settled that the situs of debts and obligations is at the domicile of the creditor. But the attachment laws of our own and of other states recognize the right of a creditor of a non-resident to attach a debt or credit owing or due to him by a person within the jurisdiction where the attachment issues, and to this extent the principle has been sanctioned that the laws of a state, for the purposes of attachment proceedings, may fix the situs of a debt at the domicile of the debtor. (*Embree* v. *Hanna, supra; Williams* v. *Ingersoll,* 89 N. Y. 508, 529.) It is at least doubtful whether this qualification of the general rule applies to negotiable instruments or other written obligations of a resident debtor, held by and in the possession of his non-resident creditor. (See *Osgood* v. *Maguire,* 61 N. Y. 524.) But we repeat, no court can acquire jurisdiction in attachment proceedings unless the *res* is either actually or constructively within the jurisdiction, and we are of opinion that the attempt to execute an attachment in Massachusetts upon the debts owing to the plaintiff by the insurance company, by serving upon the agent of the corporation there, and without having acquired jurisdiction of the

plaintiff, must fail for the reason that the debtor, the insurance company, was in no just or legal sense a resident of Massachusetts and had no domicile there, and was not the agent of the plaintiff, and that in contemplation of law the company and the debt were at the time of the issuing of the attachment in the state of New York, and not in the state of Massachusetts. This court has had occasion heretofore to consider the effect of the act of a foreign corporation constituting an agent in another state, upon whom proceedings may be served, done in compliance with the laws of such state in pursuance of a condition imposed, and to enable the corporation to do business in such state. It has been held that by such act the corporation does not change its domicile of origin or its residence. It becomes bound by judgments rendered upon service on the designated agent, because it has consented so to be bound, but it remains as before a resident of the state where it is incorporated. (*Gibbs* v. *Queen Ins. Co.*, 63 N. Y. 114; *Plimpton* v. *Bigelow, supra.*) If in this case the insurance company could be regarded as residing or having its domicile in Massachusetts for the purpose of attachment proceedings, it likewise has a domicile in every state where it may have appointed an agent under similar laws, and so constructively, upon the theory upon which the Massachusetts attachment is defended, the corporation is present as debtor to the plaintiff in every state where such agency exists, and the creditor is also present at the same time in each of such jurisdictions. The admission of such a

principle would give rise to most embarrassing conflicts of jurisdiction and subject creditors of domestic corporations to great prejudice. We think the rule is that a domestic corporation at all times has its exclusive residence and domicile in the jurisdiction of origin, and that it cannot be garnisheed in another jurisdiction for debts owing by it to home creditors, so as to make the attachment effectual against its creditor in the absence of jurisdiction acquired over the person of such creditor.

* * * * * *

"But the question in this state cannot be controlled by the statutes of Massachusetts. The legal proceedings or judgments of another state are recognized here only where jurisdiction has been acquired in the foreign forum. But it is only jurisdiction in an international sense, or according to the course of common law, and judicial proceedings which conform to, or rather, which are not taken in disregard of the principles and rules of general jurisprudence, which this state is bound to recognize, and if the laws of Massachusetts go to the extent claimed, and assume to authorize attachment proceedings to seize a credit owing to a resident of this state, when neither the debtor nor creditor are within the jurisdiction, this state is not, we think, bound to recognize them. The law of a state cannot make a debtor a resident of that state by so declaring, contrary to the fact and the rule of general law, at least so as to bind another jurisdiction by the declaration." Pp. 218-221.

It will be recalled that in the case of *Harris* v. *Balk*, 1905, 198 U. S. 215, Harris, a citizen of North Carolina, owed money to Balk, also a citizen of that state. Harris, while temporarily in Maryland, was garnisheed by a creditor of Balk. Process was personally served in Maryland upon Harris and judgment was thereafter entered and paid. Thereafter Harris was sued by Balk in North Carolina for the same debt. This court (reversing the court of North Carolina) held that the payment in the Maryland garnishee proceeding was a defense in the subsequent North Carolina action. The decision was to the general effect that a judgment against a garnishee properly obtained, according to the law of the state where instituted and paid must, under the full faith and credit clause of the Constitution, be recognized by the courts of another state as a payment of the original debt. The judgment of garnishment was properly obtained because the obligation of the debtor to pay his debt was a personal one existing in any jurisdiction in which the debtor might be, whether temporarily or otherwise, and the test of jurisdiction to garnish in Maryland was whether the creditor of the garnishee could have sued for the debt in Maryland. Upon these two propositions of law, the payment in the garnishee proceeding in Maryland was held to bar recovery in the subsequent suit in North Carolina.

This court commented on the *Douglass* case as follows:

> "The case in 138 N. Y. 209, *Douglass* v. *Insurance Co.*, is not contrary to this doctrine.

> The question there was not as to the temporary character of the presence of the garnishee in the State of Massachusetts, but, as the garnishee was a foreign corporation, it was held that it was not within the State of Massachusetts so as to be liable to attachment by the service upon an agent of the company within that State. The general principle laid down in *Embree* v. *Hanna*, 5 Johns. (N. Y.) 101, was recognized as correct." *Harris* v. *Balk*, 1905, 198 U. S. 215, 225.

It may be observed that in *Harris* v. *Balk* this court did not cite the *Douglass* case and then express any disagreement. The case was cited with apparent approval but distinguished from the case at the bar of this court, as it well might be. There is a fundamental and a very practical difference between the laying hold by garnishment process, of an indebtedness due from an individual where the process is served personally as in the *Harris* case, and the laying hold of a debt due from a corporation by process not served upon an officer of the corporation but served merely upon a local agent in any one of the jurisdictions in which the corporation may have an agent, where the debt does not arise from any transaction within the jurisdiction nor relate to the business which the local agent is conducting. The importance of this question to insurance companies doing business throughout the country, with local agents of local authority in numerous communities in the several states, can scarcely be over-estimated.

Assuming the question to be an open one, or the court to be prepared to consider favorably the reasoning of Chief Judge Andrews in the *Douglass* case, it is respectfully urged that the principles and the conclusion of that court should be adopted as a proper adjustment of jurisdictional conflicts in cases where the obligations of insurance companies are involved. It may perhaps with propriety, be added that the difficulties of insurance companies, arising from the uncertainties of the various laws in reference to garnishee process, have, in the past, been extensive and highly burdensome. There seems to be no sound reason why their contracts and the obligations thereof should not be localized in accordance with the practical and common sense intendment of the parties and it is, therefore, respectfully urged that this court should, in so far as possible, give consideration to a rule for adjustment of such jurisdictional conflicts in the interest of orderly procedure and having regard to the business necessities of companies engaged in an important service to the people of the country generally, which service necessarily involves the use of agents of limited authority in every community in the country and the making of a multitude of contracts, which by their very nature are intended to have only a local operation.

The economic desirability of this seems to have been appreciated by this court. *Morris & Co.* v. *Ins. Co.*, 1929, 279 U. S. 405.

The case at bar is strongly suggestive of the general injustice to which insurance companies are subjected.

It was at least a natural expectation on the part of New York insurance companies that upon entering into a reinsurance contract with a Mexican Insurance Company, their obligations thereunder would be worked out between the parties to the contract and in Mexico or in New York as the contract should provide. It was not within the scope of any reasonable expectation that the making of such a reinsurance agreement with the Mexican Insurance Company would have the effect of drawing the question of their liabilities into litigation in Texas, where the other party to the contract, the Mexican Insurance Company, is not in court at all and where they (the New York companies) are compelled to litigate questions of their liability at a place far removed from the domicile of the officers in charge of such matters and where their activities are normally restricted to the conduct of local transactions by a local agent.

It may be that the case of *Louisville & Nashville Railroad* v. *Deer*, 1906, 200 U. S. 176, will be pointed to as authority against the arguments which are here advanced. That case was an action to recover an admitted debt. The plaintiff—the railroad company—had been garnisheed in a suit brought against it in Florida where the railroad company did business. The original creditor had been notified of the proceeding by publication but had not defended. The judgment had been paid. That payment was held by this court to be a valid defense to the subsequent action, citing *Harris* v. *Balk*. Counsel for the appellants will not venture a suggestion as to whether it was intended by that decision to estab-

lish the law for all corporations, including railroads and insurance companies, to the effect that the appointment of every agent, in any jurisdiction, carries into that jurisdiction, so as to be subject to garnishee process, any indebtedness however or wherever contracted. It may be observed that that case, and also the case of *Harris* v. *Balk*, arose after judgment had been satisfied by payment in the prior proceeding. Had either of those cases been decided otherwise than as they were, double payment of the same liability would have resulted and it may be that the court was influenced in those cases by such broad and general considerations as were expressed by Chief Justice Kent in *Embree* v. *Hanna*, 1809, 5 Johns. (N. Y.) 101.

In the case at bar this court is not faced with the pressing consideration that if the garnishment proceeding in Texas is not upheld, the inequity of a double recovery would result.

CONCLUSION

THE JUDGMENT OF THE SUPREME COURT OF TEXAS SHOULD BE REVERSED AND THE CAUSE REMANDED WITH DIRECTION TO DISMISS BOTH COMPLAINTS.

New York, January 3, 1930.

Respectfully submitted,

DAVID RUMSEY
MARK W. MACLAY
Counsel for Appellants